IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-529

MONTANA POWER COMPANY ET AL., *Petitioners*,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CITATIONS

† All undesignated references to the U. S. Code within this petition are to the 1970 edition.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on August 2, 1976.*

* This petition is filed on behalf of the Montana Power Company, Pacific Power and Light Company, Portland General Electric Company, Puget Sound Power & Light Company, and the Washington Water Power Company, petitioners in No. 1763 below; the Pacific Coal Gasification Company and Transwestern Coal Gasification Company, petitioners in No. 75-1371 below; The Dayton Power and Light Co., Kentucky Power Company, Ohio Edison Company, and Ohio Power Company, petitioners in No. 75-1663 below; and the Cincinnati Gas & Electric Company, The Cleveland Electric Illuminating Company, and Columbus and Southern Ohio Electric Company, petitioners in No. 75-1664 below. Insofar as petitioners can determine, the parties to the consolidated proceedings below that will be adverse respondents to the petition are the United States Environmental Protection Agency, its Administrator (Russell E. Train), Sierra Club, the Washington Metropolitan Coalition for Clean Air, New Mexico Citizens for Clean Air and Water, Oregon Environmental Council, Sally Rodgers, John Tanton, Susan L. Moore, Stephen Winter, and the States of New Mexico and Nevada. The remaining interested parties below are automatically respondents to this petition, pursuant to this Court's Rule 21(4), but, insofar as petitioners know, they will not be adverse to this petition. These Rule 21(4) respondents are listed in Appendix G hereto.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A hereto) has not yet been officially reported, but is unofficially reported at 9 ERC 1129. That opinion reviewed regulations promulgated by the Environmental Protection Agency, as amendments to state implementation plans under the Clean Air Act, which were published in the Federal Register, together with an explanatory preamble, on December 5, 1974 (39 F.R. 42509), and were revised on January 16, 1975 (40 F.R. 2802), June 12, 1975 (40 F.R. 25004) and September 10, 1975 (40 F.R. 42011). The regulations thus promulgated amended Part 52 of 40 C.F.R., and are attached along with the explanatory preamble as Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals (Appendix C hereto) was entered on August 2, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Environmental Protection Agency has authority, under the Clean Air Act as amended, to promulgate regulations amending State plans for the implementation of the national ambient air quality standards established pursuant to that Act so as to include therein provisions for the prevention of significant deterioration of air quality that is better than is required to comply with those standards, and to disapprove the implementation plans adopted by each of the individual States because they failed to include such significant deterioration provisions?

2. Assuming that the Environmental Protection Agency does have such authority, whether the significant deterioration regulations which it has promulgated

nonetheless are arbitrary or capricious or otherwise violate the Clean Air Act, because:

(a) they attempt to prevent "significant deterioration" through a classification scheme that is unrelated to any known, anticipated or quantifiable adverse air quality effects;

(b) they do not initially classify all lands as Class III, rather than as Class II, so as to at least place the burden of obtaining and justifying a reclassification of land upon those who seek to impose more stringent limitations than are imposed by the national ambient air quality standards;

(c) they arbitrarily impose rigid incremental limits for each classification which do not allow for local conditions, which are implemented through modeling techniques that generally are inaccurate and are virtually unworkable for many areas of the nation, and which may be used up by unregulated new sources;

(d) they provide for reclassification of Federal and Indian lands by Federal land managers and the governing bodies of Indian Tribes, thereby treating such landowners differently from other persons and encroaching upon the responsibilities of the States, which may have the effect of imposing more stringent limitations upon adjoining lands up to 60 or more miles from the boundaries of such Federal or Indian lands**; or because

(e) they were promulgated without compliance with the procedural requirements specified in § 110 of the Clean Air Act?

3. Assuming that the Environmental Protection Agency does have such authority and its significant

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** A question also is presented as to whether this aspect of the regulations is ripe for review.

deterioration regulations otherwise comply with the Clean Air Act, whether those regulations and the Act as so construed are unconstitutional because:

(a) the Act does not provide any standards or guidance for determining what constitutes "significant deterioration" of the quality of air, as to the manner in which it is to be prevented, or as to the extent to which it is to be prevented, and therefore constitutes an unrestrained delegation of legislative power to the Environmental Protection Agency contrary to Article I, Section I of the Constitution, and to the Fifth Amendment thereto;

(b) the regulations so restrict the use of private property as to constitute an uncompensated "taking" in violation of the Fifth Amendment, and do not have any rational relationship to the protection of public health or welfare or other valid legislative purpose contrary to the Fifth Amendment; or because

(c) the regulations impose local land use controls and otherwise encroach upon the powers reserved to the States and to the people by the Tenth Amendment and by Article IV, Section IV?

CONSTITUTION, STATUTE AND REGULATIONS INVOLVED

The regulations being reviewed, 40 C.F.R. §§ 52.01 (d), (f), and 52.21 (1975), *as amended,* 40 F.R. 42011 (September 10, 1975), are set forth in Appendix B hereto. The relevant provisions of the Constitution and of the Clean Air Act, *as amended,* 42 U.S.C. § 1857 *et seq.*, are set forth respectively in Appendices D and E hereto. Relevant provisions of certain earlier versions of the Clean Air Act (77 Stat. 392 (1963) and 81 Stat. 485 (1967)) are set forth in Appendix F hereto.

STATEMENT OF THE CASE

This case involves the interpretation and application of the Clean Air Act, *as amended,* 42 U.S.C. §§ 1857 *et seq.* In particular, this case involves the issue of "significant deterioration," an issue on which this Court three years ago divided four-to-four in *Fri* v. *Sierra Club.*[1] In compliance with the district court's order in that earlier litigation, the Administrator of the Environmental Protection Agency (hereinafter "EPA") has disapproved plans adopted by every State for the implementation of national primary and secondary ambient air quality standards and has amended or revised those plans by promulgating regulations which include therein provisions preventing "significant deterioration" of the quality of air that is cleaner than is required by the national primary and secondary standards. Those actions by EPA have been upheld by the court below in this proceeding.

This has been done even though the national ambient air quality standards are prescribed by EPA under § 109 of the Clean Air Act at levels "requisite to protect the public health" after "allowing an adequate margin of safety" (primary standards) and "requisite to protect the public welfare from any known or anticipated adverse effects" (secondary standards); and even though § 110 of the Act provides that EPA "shall approve" a State implementation plan that meets eight specified requirements, none of which has been contended or held to include the prevention of

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[1] *Sierra Club* v. *Ruckelshaus,* 344 F. Supp. 253 (D. D.C., 1972), *aff'd per curiam,* 4 ERC 1815 (D.C. Cir., 1972), *aff'd by equally divided Court, sub nom. Fri* v. *Sierra Club,* 412 U.S. 541 (1973). See pp. 11-12 *infra.* Petitioners were not parties to that litigation.

significant deterioration. The only asserted statutory basis for the significant deterioration regulations is the statement in the introductory "Findings and Purposes" section (§ 101) that one of the purposes of the Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."

A. The Clean Air Act

For the most part, the relevant provisions of the Clean Air Act were enacted by the Clean Air Act Amendments of 1970 (84 Stat. 1676), as summarized below. However, the "Findings and Purposes" section of the Act was first enacted in substantially its present form by the Clean Air Act of 1963 (77 Stat. 392). This includes the finding that "the prevention and control of air pollution at its source is the primary responsibility of States and local governments," which now appears unchanged in § 101(a)(3), 42 U.S.C. § 1857(a)(3). It also includes the statement of purpose "to protect the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population". That statement, as amended by the Air Quality Act of 1967 (81 Stat. 485) to add "and enhance the quality of" after "to protect," is now set forth in § 101(b)(1), 42 U.S.C. § 1857(b)(1). As has been noted, that purpose clause is the only provision of the Clean Air Act which has been urged or held to provide a statutory basis for a requirement of Federal action preventing significant deterioration.

Since the major underlying premise upon which the requirement of preventing significant deterioration

rests is the protection, rather than the enhancement, of air quality that exceeds Federal standards, any such requirement must come, if at all, from the "protect", rather than from the "enhance", language. Therefore, it would seem that if such a requirement exists, it must have originated in 1963. Yet, as this Court pointed out in *Train* v. *Natural Resources Def. Council,* 421 U.S. 60, 63-64 (1975), the only direct Federal intervention authorized by the 1963 Act was "to abate *interstate* pollution in limited circumstances" (emphasis by the Court); namely, suits by the Attorney General for the abatement of "pollution of air which is endangering the health or welfare of persons" in other States (§ 5, 77 Stat. 396-99). Moreover, while the 1967 Act "increased the federal role in the prevention of air pollution, by according federal authorities certain powers of supervision and enforcement," under that Act "the States generally retained wide latitude to determine both the air quality standards which they would meet and the period of time in which they would so do." *Train* v. *Natural Resources Def. Council, supra* at 64. Insofar as we are aware, no one has even suggested that there is any legislative history of the 1963 Act indicating that the Congress nonetheless intended to require the prevention of significant deterioration, and the legislative history of the 1967 Act also provides no support for any such requirement.[2]

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[2] The court below did state that "to a lesser degree, the legislative history of the" 1967 Act "expressed a policy of nondeterioration" (App. A, at 18a). It cited (*id.*, n. 30, p. 18a) a statement in S. Rep. No. 90-403, 90th Cong., 1st Sess. (1967), which "quoted Senator Muskie for the proposition that it was necessary 'to assure the lessening of current levels of pollution and to prevent further environmental deterioration in the future.' " That language was taken from a sentence which stated in full: "*We must define the*

[*continued*]

This brings us to the Clean Air Amendments of 1970 which, as this Court has stated, "sharply increased federal authority and responsibility in the continuing effort to combat air pollution," but "[n]onetheless . . . explicitly preserved the principle" that "'[e]ach State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State. . . .'" *Train* v. *Natural Resources Def. Council, supra* at 64 (*quoting* § 107(a), 42 U.S.C. § 1857c-2(a)).

Under the provisions of the 1970 Amendments, EPA designates each air pollutant which in its "judgment has an adverse effect on public health or welfare" (§ 108(a)(1)(A), 42 U.S.C. § 1857c-3(a)(1)(A)), and establishes national primary and secondary ambient air quality standards for each such air pollutant (§ 109(a), 42 U.S.C. § 1857c-4(a)). A primary standard is set at the level which EPA deems "requisite to protect the public health" after "allowing an adequate margin of safety." A secondary standard is set at the level which EPA deems "requisite to protect the public welfare from any known or anticipated adverse effects associated with the pres-

steps necessary to assure the lessening of current levels of pollution and to prevent further environmental deterioration in the future," and Senator Muskie went on in the next quoted sentence to say that: "And recognizing the importance of the economic-technological-environmental relationship *we must develop the requisite framework to implement the desired goals.*" S. Rep. No. 90-403, *supra* at 8-9 (emphasis added). No one has suggested that the Congress in the 1967 Act did "define the steps necessary" to prevent significant deterioration or "develop the framework to implement" any "desired goal" in that regard, and no one has suggested that there is any other legislative history of the 1967 Act indicating an intent on the part of Congress to require prevention of significant deterioration.

ence of such air pollutant in the ambient air" (§ 109(b), 42 U.S.C. § 1857c-4(b)).[3] EPA also prescribes standards of performance for new stationary sources which limit the emission of pollutants by new facilities (including modifications of existing facilities) to the level "achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction)" EPA "determines has been adequately demonstrated" (§ 111, 42 U.S.C. § 1857c-6).

Also under those provisions of the 1970 Amendments, each State has "the primary responsibility for assuring air quality within . . . such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved . . . in such State" (§ 107(a), 42 U.S.C. § 1857c-2(a)). Thus, "after reasonable notice and public hearings," each State adopts plans for "implementation, maintenance, and enforcement" of the primary and secondary standards and submits such plans to EPA for approval (§ 110(a)(1), 42 U.S.C. § 1857c-5(a)(1)). EPA "shall approve" such a plan so submitted if it satisfies eight criteria or requirements specified in § 110(a)(2) of the Act, 42 U.S.C. § 1857c-5(a)(2), and also "shall approve" any revision by a State of the plan if such revi-

[3] The 1970 Amendments also included the following explanation of the term "welfare":

> "All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being." § 302(h), 42 U.S.C. § 1857h(h).

sion meets those specified "requirements" (§ 110(a)(3)(A), 42 U.S.C. (Supp. V) § 1857c-5(a)(3)(A)). It has never been contended by any litigant or held by any court in this proceeding (or in the preceding litigation) that any of those eight requirements consists of or includes the prevention of significant deterioration of the quality of air which would remain as clean as or cleaner than is required by the national ambient air quality standards.[4]

Moreover, § 110 not only provides that EPA "shall approve" State plans that satisfy those eight requirements, but authorizes EPA to propose "regulations setting forth an implementation plan, or portion thereof, for a State" only if the plan submitted by the State (or any portion thereof) "is determined by" EPA "not to be in accordance with the *requirements of this section*" (emphasis added, § 110(c)(1), 42 U.S.C. § 1857c-5(c)(1)). If such regulations are proposed by EPA, it must hold public hearings "within such State on any proposed regulation" unless the State has done so, and final regulations can be promulgated to become part of a State implementation plan only if the State in the meantime has not voluntarily adopted and submitted a "plan (or revision) which" EPA "determines to be in accordance with the *requirements of this section*" (*ibid.*; emphasis added).

Finally, we note that § 116 of the Act, 42 U.S.C. (Supp. V) § 1857d-1, expressly preserves the right of the States to include in implementation plans more "stringent" limitations upon air pollution than are required by the Act. And § 118, 42 U.S.C. § 1857f, requires Federal departments, agencies and instrumentalities to "comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements," except where exempted therefrom by the President in certain limited circumstances in which such an exemption is authorized by that section.

[4] To the contrary, those requirements are directed towards the "attainment" of primary standards "as expeditiously as practicable" and of secondary standards within "a reasonable time" (§ 110(a)(2)(A), 42 U.S.C. § 1857c-5(a)(2)(A)).

B. The Significant Deterioration Regulations

Shortly after the passage of the Clean Air Act Amendments of 1970, EPA construed the Act to require approval of State implementation plans which complied with the eight criteria specified in § 110(a)(2), and thus that agency did not find that it had the authority under the Act to disapprove such plans for failure to include a significant deterioration provision or to promulgate regulations amending the plans to include such a provision. When the Administrator described this interpretation of the Act to the responsible Congressional committees in January and February 1972,[5] the Sierra Club and other groups filed a suit in the United States District Court for the District of

[5] Hearings on *Clean Air Act Oversight* before the Subcomm. on Public Health and Environment of the House Comm. on Interstate and Foreign Commerce, 92d Cong., 2d Sess., ser. 92-105 (1972) at 530-31; Hearings on *Implementation of the Clean Air Act Amendments of 1970* before the Subcomm. on Air and Water Pollution of the Senate Public Works Comm., 92d Cong., 2d Sess., ser. 92-H 31 (1972), Pt. 1, at 246-249, 271-276. We note that it was that contemporaneous interpretation by EPA, rather than its subsequent actions in response to court orders, which is entitled to weight with the Court and to be accepted if it constitutes a "reasonable" interpretation of the Act, even if it is not the "only one" that EPA "permissibly could have adopted . . . ." *Train* v. *Natural Resources Def. Council, supra* at 75.

Columbia contesting that position. That court rejected EPA's construction in this regard, ordered EPA to disapprove plans insofar as they did not "effectively prevent significant deterioration of existing air quality," and directed EPA to propose regulations for the inclusion in the plans of such significant deterioration provisions. *Sierra Club* v. *Ruckelshaus,* 344 F. Supp. 253 (D. D.C., 1972). The District of Columbia Circuit affirmed *per curiam* on the basis of the opinion below, 4 ERC 1815 (1972), and after granting a petition by the Government for writ of certiorari, this Court affirmed without opinion by an equally divided Court. *Fri* v. *Sierra Club,* 412 U.S. 541 (1973).[6] Petitioners were not parties to that proceeding.

In response to that decision, EPA disapproved the implementation plans of every State insofar as they failed to provide for the prevention of significant deterioration (37 F.R. 23836); issued an initial notice of proposed rulemaking (38 F.R. 18985) and held public hearings at six locations (but not in every State); issued revised proposed regulations (39 F.R. 30999); and, on December 5, 1974, published its final significant deterioration regulations (39 F.R. 42509). In proposing such regulations, EPA stated that it did not regard the *Ruckelshaus* decision as "definitive" in view of this Court's equal division; and that EPA therefore "adheres to the view . . . that the Act does not require EPA or the States to prevent significant deterioration

[6] Thus the only opinion in that case was that of District Judge Pratt. As was true of the court below in this case, he relied entirely upon the "protect and enhance" language of the Findings and Purposes section as the statutory basis for the decision, and sought to support his decision by reference to legislative history of the 1970 Amendments. 344 F. Supp., at 255-256.

of air quality," and was acting only because of "the preliminary injunction issued by the District Court" (39 F.R., at 18986).

In proposing and promulgating these regulations, EPA was faced with the fact that the courts in the *Ruckelshaus* case had not determined "what constitutes significant deterioration and exactly how it will be prevented" (39 F.R., at 18986). So, too, the "protect and enhance" statutory language and the legislative history relied upon similarly provided no guidance, except insofar as they might imply that all degradation of air (and thus all economic growth) should be prevented—which no one contended to have been contemplated by the Congress (39 F.R., at 18987). Furthermore, since the national ambient air standards are intended to prevent all "demonstrable or predictable adverse effects which can be quantitatively related to pollutant concentrations in the ambient air," EPA concluded that "significant deterioration must necessarily be defined without a direct quantitative relationship to specific adverse effects on public health and welfare" (39 F.R., at 18987). Hence, any judgment of what deterioration would be significant "must be essentially subjective" (39 F.R., at 18988), based upon "consideration of varying social, economic, and environmental factors" (39 F.R., at 31001), and "[a]ny policy to prevent significant deterioration involves difficult questions regarding how the land in any area is to be used" (*ibid.*).

The final regulations apply the significant deterioration provisions to two pollutants: particulate matter and sulfur dioxide. In view of the considerations outlined above (see 39 F.R., at 42510; App. B, at 55a), EPA established a system for classifying the lands within a State. In Class I areas, "practically any" in-

crease in the levels of those pollutants would be prohibited (and thus practically any economic growth); in Class II areas, somewhat larger increases in the levels of those pollutants would be allowed (but significantly less than would be allowed by the national standards) so that in EPA's judgment "moderate well-controlled growth" would be permissible; and in Class III areas, the level of those pollutants (and thus economic growth) could be increased up to the level allowed by the national standards (*ibid.*). However, the regulations prohibit the construction of a new source which "would violate an air quality increment either in the area where the source is to be located or in any neighboring area in the State;" accordingly, a power plant located in a Class II area might violate Class I restrictions in areas as much as "60 or more miles away" so that the effect of a more restrictive classification "extends well beyond" its "boundaries into the adjacent areas" (39 F.R., at 42512; App. B, at 66a-67a).

The regulations initially place all areas in Class II, because EPA "continues to feel that an initial Class II designation represents the most reasonable compromise between" the positions urged by industrial groups, on one hand, and environmental groups on the other hand (*ibid.*). They established a procedure to be administered by the individual States, subject to review by EPA, which is intended by EPA to allow such States "to reclassify any area to accommodate the social, economic, and environmental needs and desires of the public" (39 F.R., at 42510; App. B, at 55a). Such a reclassification cannot be approved, however, unless the State assumes EPA's obligation to implement the regulation's new source review requirements discussed below or receives a waiver from EPA in this regard (40

C.F.R. § 52.21(c)(3)(vi)(a), (f); App. B, at 81a-83a). In addition, Federal land managers and Indian governing bodies can reclassify Federal or Indian lands within their respective jurisdictions, subject to consultation with the State or States involved and review by EPA, but Federal land managers may only adopt a more restrictive classification (*i.e.*, Class I rather than Class III). See 39 F.R., at 42513; App. B, at 69a-70a). The restrictions upon increments of pollutants in the three classifications are implemented by review of proposed new stationary sources, construction of which is to be prohibited if such an increment will be violated even if the new source will use the best available technology as required by § 111 of the Clean Air Act. See 39 F.R., at 42510; App. B, at 55a.

C. The Proceedings Below

Some 14 separate petitions were filed in various courts of appeals to review the significant deterioration regulations, pursuant to § 307(b)(1) of the Act, 42 U.S.C. § 1857h-5(b)(1), most of which were filed by multiple parties. All those not filed in the District of Columbia Circuit were transferred thereto, and that court consolidated the cases for briefing and argument. The Court of Appeals upheld the validity of those regulations. Its August 2, 1976 opinion was written by Judge Wright, who was joined by Judge Robinson. Judge Wilkey "concur[red] in the result only" without writing a separate opinion (App. A, at 51a).

The Court of Appeals generally applied the "arbitrary and capricious" standard of the Administrative Procedure Act, which it deemed to require "that agency action be affirmed if a rational basis exists therefor" (App. A, at 15a). But in regard to the "question whether the Clean Air Act should be interpreted to pro-

hibit significant deterioration of air cleaner than the national standards," which "is necessarily the first level of analysis," the Court of Appeals "require[d] the clearest showing that *Sierra Club* v. *Ruckelshaus* was incorrectly decided, since Judge Pratt's decision was affirmed by both another panel of this court and an equally divided Supreme Court" (*id.*, at 16a-17a). Thus, the court below in effect rejected the approach followed by this Court, in *Train* v. *Natural Resources Def. Council, supra* at 74-75, under which EPA's initial interpretation of the Act, rather than revised regulations which it issued in conformity with prior court decisions to the contrary, was entitled to "accept[ance] by the reviewing courts" if "reasonable," even if it was not "the only one [EPA] permissibly could have adopted . . . ."[7] See n. 5, p. 11, *supra.*

After reconsidering the decision in *Sierra Club* v. *Ruckelshaus* under the standard of review thus enunciated, the Court of Appeals found "no substantial reason to question" its "continuing validity" (App. A, at 29a; generally, at 16a-29a). As we have noted, the only statutory basis asserted for the holding that the Clean Air Act requires the prevention of significant deterioration was the "protect and enhance" language in § 101(b)(1), setting forth one of the purposes of the Act (*id.*, at 17a-18a). The primary reliance of the court below, however, was placed upon certain legislative history of the 1970 Amendments (*id.*, at 18a-23a), which was thought to afford "every indication" that Congress intended in 1970 to continue a policy of prevention of significant deterioration of air quality (*id.*, at 23a). The Court of Appeals also thought that its interpretation was bolstered by "recent congressional statements" upon pending legislation (*id.*, at 23a), and by the acceptance of *Sierra Club* v. *Ruckelshaus* "in a number of other circuits" (*id.*, at 24a).[8] And, it rejected contentions by these petitioners that the "shall approve" language in § 110(a)(2) of the Act, as interpreted and applied by decisions of this Court subsequent to *Sierra Club* v. *Ruckelshaus,* necessitated a contrary holding (*id.*, at 24a-27a).

In addition, the Court of Appeals rejected a number of contentions, some by environmentalists and some by industry petitioners, to the effect that the significant deterioration regulations are arbitrary and capricious or otherwise invalid, even assuming that the Clean Air Act requires prevention of significant deterioration (App. A, at 29a-48a).

With respect to such contentions by Sierra Club, the Court of Appeals held (1) that EPA's exclusion of four additional "pollutants which have an adverse effect on public health or welfare" (*id.*, at 29a) "was rational

[7] The prior decisions involved in *Train* (by four courts of appeals) had not been affirmed by an evenly divided Supreme Court, but of course affirmances by an equally divided Court are without precedential effect. See, *e.g., Neil* v. *Biggers,* 409 U.S. 188, 190-92 (1972). Nonetheless, the Court of Appeals below was entitled to accord precedential effect to its own prior decision (if, as it concluded, subsequent decisions by this Court were not to the contrary), so that its approach may have been appropriate in that court even though it would not be appropriate in this Court.

[8] We note that the significant deterioration issue had not been fully briefed in those cases. For example, one of those cases was the decision of the Fifth Circuit which was before this Court in *Train* v. *Natural Resources Def. Council, supra.* The petitioner's brief in the Fifth Circuit discussed the significant deterioration issue in a short two-page argument which simply asserted that the issue had been settled by *Sierra Club* v. *Ruckelshaus,* and EPA did not respond at all to that argument in its brief.

and based on consideration of the relevant factors" since EPA "does not have technology or modeling techniques rationally to regulate emissions [of those pollutants] on a case-by-case basis" (*id.*, at 31a; generally, at 29a-31a); (2) that the regulations were not invalid on the grounds that Class II and Class III allow significant deterioration and are based upon considerations other than air quality, since "it was a rational policy decision that the significance of the deterioration of air quality should be determined by a qualitative balancing of clean air considerations against the competing demands of economic growth, population expansion, and development of alternative sources of energy" (*id.*, at 33a; generally, at 32a-34a); and (3) that "[i]t was a rational policy decision to limit the instant regulations to prospective concerns only" (*id.*, at 35a) since "inclusion of the earlier construction would limit practical use of the regulations to regulate future development" (*id.*, at 35a; generally, at 34a-36a).[9]

With respect to the contentions by industry petitioners, the Court of Appeals held (1) that the regulations need not be related to anticipated adverse effects on public health or welfare, because "EPA has acted reasonably in permitting each state . . . to develop a workable definition of significant deterioration" based upon its "evaluation of the relative importance of the competing interests" (App. A, at 40a-41a; generally, at 39a-41a); (2) that the conceded inadequacy of the com-

[9] In addition, the court below rejected contentions by Sierra Club that EPA erred in providing within its "significant deterioration" regulations for preconstruction review of new stationary sources using an industry-wide, rather than case-by-case, pollution control formula under the new source performance standards provided therein, where applicable, and in providing for such review with regard to only "significant", rather than all, new sources (App. A, at 35a-39a).

puter modeling techniques prescribed by the regulations "to predict with precision what effect a proposed new source will have on the ambient air, and therefore on the allowable increments for a given region" (*id.*, at 41a), was not "at this time . . . a substantial objection" (*id.*, at 42a), since the Court had "no basis on which to question EPA's judgment" that its "predictive techniques" " 'can be used in comparing the relative impact of a source' " (*id.*, at 41a); and (3) that EPA was not required to follow the procedures prescribed in § 110 (c) of the Act in regard to the promulgation of regulations revising State implementation plans, since "the requirement of prevention of significant deterioration does not fit neatly into the statutory scheme, as it is not expressly included in Section 110 of the Act" (*id.*, at 44a; generally, at 42a-45a).[10]

The Court of Appeals did not decide the merits of a contention by industry petitioners that the regulations violated the Clean Air Act insofar as they authorized Federal land managers and the governing bodies of Indian Tribes to reclassify Federal and Indian lands. Rather, the court below held that that issue "is not yet ripe for review" (*id.*, at 47a; generally, at 45a-48a).

Finally, the Court of Appeals rejected contentions by industry petitioners that the Clean Air Act is unconstitutional, insofar as it may be held to authorize the significant deterioration regulations, on the grounds that the Act does not provide any standards or guidance

[10] The court below did not directly address a contention by industry petitioners that all areas initially should be placed in Class III, or the reverse contention by Sierra Club that all areas initially should be placed in Class I, rather than in Class II. However, those contentions obviously were rejected when the regulations were upheld.

as to the manner or extent of the prevention of significant deterioration; that the significant deterioration regulations do not have any rational relationship to the public health or welfare; that the regulations so limit the use of privately owned (and also State owned) land as to constitute an unconstitutional taking; and that the regulations entrench upon powers reserved to the States (App. A, at 48a-50a).

D. Recent Attempts at Legislating a Specific Significant Deterioration Provision

Both the Senate and the House recently passed bills (S. 3219 and H.R. 10498, 94th Cong.) which, *inter alia,* would have amended the Clean Air Act so as to include detailed substantive provisions concerning the prevention of significant deterioration. The significant deterioration provisions contained in those bills differed substantially from each other, from the regulations promulgated by EPA, and from the recommendation of the President who urged that "the most appropriate course of action would be to amend the Act to preclude application of all significant deterioration provisions until sufficient information concerning final impact can be gathered" in view of their "potentially disastrous effects on unemployment and on energy development . . . ."[11] A Conference committee reported a compromise provision. H. Rep. No. 94-1742, *reprinted at* 122 Cong. Rec. No. 150 (Pt. 2), at H 11959-94 (daily ed.); *see specifically* H 11970-73, 11987-88. But, the Conference bill failed of passage in both Houses prior to adjournment *sine die.*

[11] 122 Cong. Rec. No. 118, at S 13141 and S 13160-61 (identical letters from the President to the chairmen of the House and Senate committees which handled the pending bills) (daily ed.).

As the court below noted (App. A, at 23a), the committee reports on the bills contained statements to the effect that a "policy" of preventing significant deterioration was incorporated into the 1967 Air Quality Act by enactment of the "protect and enhance" purpose clause and was not altered by the 1970 Amendments. Similar statements were made during the debates by proponents of the significant deterioration provisions,[12] while opponents were equally clear that no such "policy" had ever been intended by the Congress.[13]

Moreover, even those who supported the view that such a "policy" was included within the "protect and enhance clause" conceded that the "Congress did not provide specific guidelines for a nondegradation pro-

[12] See 122 Cong. Rec. No. 112, at S 12480 (Sen. Muskie) (daily ed.); No. 114, at S 12701 (Sen. Tunney) (daily ed.);No. 115, at S 12781 (Sen. Buckley) (daily ed.); No. 118, at S 13182 (Sen. Eagleton) (daily ed.); No. 119, at H 8296, 8297 (Rep. Rogers), H 8303 (Rep. Heinz), and H 8332 (Rep. Bingham); No. 134, at H 9562 (Rep. Preyer) (daily ed.).

[13] See H. Rep. No. 94-1175, 94th Cong., 2d Sess. (1976) at 445-446 (Rep. Satterfield) and 488-489 (Reps. Devine, Broyhill, Carter, Brown, Skubitz, Collins and McCollister); 122 Cong. Rec. No. 112, at S 12458 (Sen. Scott) (daily ed.); No. 118, at S 13140 (Sen. Moss), S 13152 (Sen. Fannin), S 13155 (Sen. Garn), S 13156 (Sen. Curtis), and S 13160 (Sen. Helms) (daily ed.); No. 119, at H 8297 (Rep. Broyhill), H 8298 and H 8306 (Rep. Satterfield) (daily ed.); No. 120, at S 13519 (Sen. Scott) (daily ed.); No. 134, at H 9559 (Rep. Satterfield), H 9566 (Rep. Hagedorn) (daily ed.). In addition, some of the proponents of the proposed provisions also conceded that it constituted a new program without any basis, even as to "policy," in the existing law. See S. Rep. No. 94-717, 94th Cong., 2d Sess. (1976), at 105 (Sen. Gravel) and 118 (Sen McClure); 122 Cong. Rec. No. 112, at S 12469 (Sen Gravel) (daily ed.); No. 118, at S 13164 (Sen. McClure) (daily ed.).

gram;"[14] that the "question of exactly what constitutes significant deterioration had not been directly addressed by the Congress;"[15] that the Clean Air Act "does not clearly spell out a nationally uniform process by which the air quality of clean air regions will be preserved;"[16] and that, while the 1970 Amendments "gave careful consideration to the need for cleaning up dirty areas," that Act "largely overlooked the need to develop a clear and workable policy to protect our National's vast clean air regions."[17] So, too, it was urged by proponents that the Congress has a Constitutional "responsibility to define national policy"[18] and that "EPA's current regulations are simply not an adequate response to this problem."[19] According to Senator Muskie, the Senate "committee unanimously agreed that the prevention of deterioration of clean areas should be resolved by the Congress and not by the courts."[20]

Furthermore, it was agreed by proponents, as well as by opponents, that the significant deterioration issue

[14] 122 Cong. Rec. No. 118, at S 13182 (Sen. Eagleton) (daily ed.).

[15] 122 Cong. Rec. No. 112, at S 12459 (Sen. Randolph) (daily ed.).

[16] 122 Cong. Rec. No. 119, at H 8296 (Rep. Rogers) (daily ed.).

[17] 122 Cong. Rec. No. 114, at S 12701 (Sen. Tunney) (daily ed.).

[18] S. Rep. No. 94-717, *supra* at 115 (Sens. Buckley and Stafford).

[19] 122 Cong. Rec. No. 119, at S 13317 (Sen Muskie) (daily ed.).

[20] 122 Cong. Rec. No. 113, at S 12543 (daily ed.). Senator Muskie commented as follows during the floor debate about the conference compromise on significant deterioration: "Witnesses on both sides [, industry and environmentalists,] came to us and pleaded, 'Take this out of EPA's hands; take this out of the courts. Give us a clear policy so we shall know where we are going.'" 122 Cong. Rec. No. 151, at S 17533 (daily ed.).

is very important, complex and controversial, in view of its broad social and economic implications,[21] so as to require thorough consideration by the Congress.[22] H. Rep. No. 94-1175 devoted over 70 pages (pp. 4-7, 83-151) and S. Rep. No. 94-717 devoted 13 pages (pp. 3, 16-27) to the significant deterioration issue (exclusive of additional and dissenting views), and most of the lengthy floor debates on the bills and on the Conference compromise related to that issue despite the fact those bills contained other controversial provisions (such as those relating to automobile emissions).

In contrast, despite the assertions by some of the proponents of the recent legislation that the "protect

[21] For example, Senator Muskie referred to that issue as being "the most difficult . . . which the committee was asked to resolve" (122 Cong. Rec. No. 112, at S 12479 (daily ed.)), approvingly quoted testimony that it "is far too significant an issue to be determined, as it has been thus far, on narrow legal grounds by the judiciary" with "economic and social implications . . . so broad that it cannot and should not be determined by an independent regulatory agency in a rulemaking proceeding" (*id.*, at S 12480), and described that issue as constituting "the most controversial aspect" of the pending legislation (*id.*, No. 113, at S 12543 (daily ed.)). The debates are peppered with generally similar comments by many other legislators.

[22] See, *e.g.*, H. Rep. No. 94-1175, *supra*, which states "that the issue of prevention of significant deterioration perhaps is unique in that it is one of the most carefully and completely studied issues to come before Congress in many years" (p. 149), refers to numerous hearings, studies and committee markup sessions relating to that issue (pp. 149-150), and notes that the committee's bill includes a requirement for a report by EPA within two years "on the progress in and any problems associated with carrying out" the significant deterioration provisions (p. 151). Much of the floor debate in both the House and the Senate was centered upon whether even further study of the issue should be had before enactment of significant deterioration provisions.

and enhance" purpose clause of the Clean Air Act was intended to embody a "policy" of preventing significant deterioration, there is no mention of such an intent or policy in the legislative history of the 1963 Act which first enacted the "protect" language or of the 1967 Air Quality Act which added the "enhance" language. See p. 7, *supra*. No member of Congress attributed such an intent or policy to the "protect and enhance clause" in the hearings, reports or debates that preceded enactment of the 1970 Amendments. See p. 35, *infra*. And, it indeed seems "inconceivable," as Senator McClure stated, "that the Congress would have made a major change in existing law using the 'Findings and Purposes' Section of the Act and without providing any guidance or explanation in the body of the Act." S. Rep. No. 94-717, *supra* at 118. Finally, when Congress undertook in the last Congress to deal explicitly with the significant deterioration issue, it did not put its reliance upon a general purpose clause, but spelled out substantive measures and detailed standards to deal with this complex and controversial issue.

REASONS FOR GRANTING THE WRIT

This Court already has recognized that it should review and decide the basic statutory issue of whether the Clean Air Act authorizes and requires EPA to amend State implementation plans so as to prevent significant deterioration of air in circumstances where the quality of the air will remain as good as or better than is required by national ambient air quality standards designed to avoid all known or anticipated adverse effects of air pollution upon the public health or welfare. While the grant of certiorari in *Sierra Club*

v. *Ruckelshaus* (409 U.S. 1124 (1973)) unfortunately did not result in a definitive resolution of that issue, because of the even division of the Court, the importance of and need for such a decision remains.

Indeed, the importance of reviewing and deciding this case may be even greater at this juncture because, if the Court should agree with the decision below on the basic statutory question, important and debatable issues would be presented as to what constitutes significant deterioration and how it can be prevented in a manner consistent with the Act and the Constitution. This is particularly true since EPA, when promulgating the regulations at issue, concededly found no guidance in the Clean Air Act or its legislative history (see p. 13, *supra*).[23] Plainly, regulations which utilize that Act to establish a mechanism for land use planning restricting future growth and development

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[23] This Court has recently reaffirmed the principle that "a congressional delegation of power to a regulatory agency must be accompanied by discernible standards, so that the delegatee's action can be measured for its fidelity to the legislative will. See, *e.g.*, *Yakus* v. *United States*, 321 U.S. 414 (1944); *Amalgamated Meat Cutters* v. *Connally*, 337 F. Supp. 737 (D.C., 1971). *Cf. Federal Energy Administration* v. *Algonquin SNG*, — U.S. — [, 44 U.S.L.W. 4883] (1976)." *City of Eastlake* v. *Forest City Enterprises, Inc.*, — U.S. —, —, 44 U.S.L.W. 4919, 4921 (1976). As EPA conceded in promulgating its regulation, there are no discernible standards for "significant deterioration" within the "protect and enhance" clause—a point dismissed by the court below (App. A, at 50a) in two sentences. Indeed, if such a complex and controversial program can emanate from the term "protect and enhance," there is no limit to the types of air pollution measures that would be authorized by that clause. And, if "protect and enhance" language is that broad, one wonders why EPA ever needed any of the other specific legislative authority granted to it within the lengthy Clean Air Act.

of much of the country,[24] and which are unrelated to known or anticipated adverse effects from air pollution upon either the public health or public welfare, are very important as well as being of very questionable legality. As EPA stated in proposing its regulations (38 F.R. 18986), they "will have a substantial impact on the nature, extent, and location of future industrial, commercial, and residential development throughout the United States," and "could affect the utilization of the Nation's mineral resources, the availability of employment and housing in many areas, and the costs of producing and transporting electricity and manufactured goods." [25]

We do not know, of course, why four members of this Court voted to affirm the decision below in *Sierra Club* v. *Ruckelshaus,* or the identity of those members. But whatever those reasons may have been at the time, we believe that the entire Court, after further consideration of the Clean Air Act in three subsequent cases, has construed that Act in a manner that is inconsistent with the decision in *Sierra Club* v. *Ruckelshaus* and the decision by the court below in this case with respect to the central issue of whether the Act requires EPA to disapprove State implementation plans and promulgate regulations so as to prevent significant deterioration. In view of the obvious importance of this case,

[24] According to S. Rep. No. 94-717, *supra* at 21, the "majority of the land mass of the United States has air quality cleaner than" is required by the national "ambient standards."

[25] The great importance of this case was recognized in the court below by Sierra Club, as well as by EPA and the industry petitioners. Both the President and the Congress have recognized, in connection with the legislation which failed of passage in the last Congress, the importance of whether and how significant deterioration is to be prevented (see pp. 20, 22-23, *supra*).

we see no need in this petition to demonstrate why the court below erred on other issues which were not involved in *Sierra Club* v. *Ruckelshaus.* We shall nevertheless indicate briefly our reasons for believing that the decision below is wrong on the basic issue of statutory construction.

It should be recalled, in appraising the significance of those three subsequent decisions by this Court, that § 110(a)(2) of the Clean Air Act in terms provides that EPA "shall approve" State implementation plans that comply with eight specified criteria or requirements; that § 110(a)(3)(A) in terms provides that EPA "shall approve" revisions of such State implementation plans that comply with those eight requirements; that § 110(c)(1) authorizes EPA to propose and promulgate regulations amending a State implementation plan only when the plan is not "in accordance with" those eight requirements; and that it has neither been contended nor held in this litigation that any of those eight criteria or requirements include the prevention of significant deterioration. See pp. 9-10, *supra.*

In *Train* v. *Natural Resources Def. Council,* 421 U.S. 60 (1975), the issue involved whether EPA was required, by § 110(a)(3)(A), to approve variances from emission limitations specified in State implementation plans as "revisions" of such plans. Those variances would permit more air pollution than otherwise would be permitted, but the implementation plan as so revised nonetheless would attain and maintain the national ambient air quality standards and otherwise comply with the eight requirements specified in § 110(a)(2). In holding that " the revision mechanism of

§ 110(a)(3) is available for the approval of those variances which do not compromise the basic statutory mandate that . . . the national primary ambient air standards be attained" (*id.*, at 99), this Court pointed out that under § 110(a)(3) "Agency approval is subject only to the condition that the revised plan satisfy the general requirements applicable to original implementation plans" (*id.*, at 80), and that (*id.*, at 79):

> "Under § 110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards. § 110(c)." (Emphasis by the Court.)

The only dissenter (without opinion) was Mr. Justice Douglas, and only Mr. Justice Powell did not participate in the decision (*id.*, at 99).

The Court's conclusion that the Act requires EPA to approve State implementation plans and revisions thereof which provide "for the timely attainment and subsequent maintenance of ambient air standards" and otherwise satisfy the eight requirements specified in § 110(a)(2) was reaffirmed in two later decisions. In *Hancock* v. *Train*, — U.S. —, 44 U.S.L.W. 4767 (1976), this Court, when deciding (over the dissent of Justices Stewart and Rehnquist (*id.*, 4777)) that § 118 does not require Federal installations to abide by the

permit requirements of State implementation plans, said (*id.*, at 4768): "EPA [is] required to approve each State's implementation plan as long as it was adopted after public hearings and satisfied the conditions specified in § 110(a)(2)." And, while holding in *Union Electric Company* v. *Environmental Protection Agency*, — U.S. —, 44 U.S.L.W. 5060 (1976), that courts may not review and overturn EPA's approval of a State implementation plan on the basis of "claims of economic and technological infeasibility" since EPA itself cannot "consider such claims in approving or rejecting a state implementation plan" (*id.*, at 5063; generally, at 5063-5065), this Court pointed out that § 110(a)(2):

> ". . . sets out eight criteria that an implementation plan must satisfy, and provides that if these criteria are met and if the plan was adopted after reasonable notice and hearing, the Administrator 'shall approve' the proposed state plan. *The mandatory 'shall' makes it quite clear that the Administrator is not to be concerned with factors other than those specified, Train* v. *NRDC*, 421 U.S., at 71 n. 11, 79, and none of the eight factors appears to permit consideration of technological or economic infeasibility. Nonetheless, *if a basis is to be found for allowing the Administrator to consider such claims, it must be among the eight criteria*, and so it is here that the argument is focused." (Emphasis added.)

All members of the Court joined in that opinion. And, we repeat, no one in this litigation has contended—and the court below did not hold—that there is a "basis" for requiring State plans to provide for the prevention of significant deterioration "among the eight criteria" specified in § 110(a)(2).

The court below rejected this Court's interpretation of § 110(a)(2) as mandating approval by EPA of State implementation plans that satisfy the eight requirements specified therein, regardless of other considerations, on the ground that the *Train* and *Union Electric* cases "did not consider the issue of nondeterioration" or "the significant deterioration of air cleaner than the national standards" (App. A, at 26a, 27a). As a matter of fact, however, *Train* was not concerned only "with air pollution below [*i.e.,* dirtier than] national standards" (App. A, at 26a). It also involved variances which would permit cleaner air to deteriorate to the level of the national standards.[26] In any event, this Court's acceptance in *Hancock* and *Union Electric* of the conclusion in *Train* that the "shall approve" language is mandatory, and the application of that interpretation to completely different factual situations, demonstrate that the Court intended it to apply generally to situations in which EPA's approval of (or disapproval and promulgation of amendments to) State implementation plans is involved. The Court did not make any exception for plans that fail to provide for the prevention of

[26] This Court expressly noted that treating variances as revisions under § 110(a)(3) "would result in variances being readily approved in two situations: first, where the variance does not defer compliance beyond the attainment date; and *second, where the national standards have been attained* and the variance is not so great that a plan incorporating it could not insure their continued maintenance." 421 U.S., at 77. (Emphasis added.) The first situation is the one identified by Judge Wright for the court below, while the second situation is the one in which deterioration of cleaner air to the level of the national standards would be permitted by approval of a variance.

significant deterioration, or even reserve that situation,[27] and no exception is made in § 110 itself.

While the court below conceded that "the provisions of Section 110(a) are, more than anything else, a summary of the mandatory requirements for all state implementation plans," it "found no indication . . . in the legislative history, that Section 110 was intended in any way to vitiate the non-deterioration mandate contained in the Senate report" (App. A, at 21a). In short, a passage in the Senate Report upon the 1970 Amendments constitutes the primary basis of the holding below that the prevention of significant deterioration also is a mandatory requirement for all State implementation plans, despite the omission of any such requirement from § 110, despite the mandatory "shall approve" language of § 110, and despite the holdings by this Court in *Train, Hancock,* and *Union Electric* that such language is truly mandatory. Indeed, that passage is the *only* bit of legislative history, from the enactment of the "protect" language by the 1963 Act through enactment of the "enhance" language by the 1967 Act and up to and including enactment of the 1970 Amendments, in which it is even claimed, by the court below or by any litigant, that any member of Congress has expressed the view that the

[27] This Court hardly could have been unaware of the significant deterioration issue since the opinion of the Fifth Circuit before the Court in *Train* and the opinion of the Eighth Circuit before the Court in *Union Electric* are among those that uncritically accepted *Sierra Club* v. *Ruckelshaus* as establishing a requirement for the prevention of significant deterioration. See 489 F.2d 390, 408 (5th Cir., 1974), and 515 F.2d 206, 220 (8th Cir., 1975). And see n. 8, p. 17, *supra.*

"protect and enhance" purpose clause requires the prevention of significant deterioration.[28]

That passage in S. Rep. No. 91-1196, 91st Cong., 2d Sess. (1970), at 11, reads as follows:

> "The bill would not require the attainment of the air quality goals within a specified time period. Nevertheless, it is the Committee's view that progress in this direction should be made as rapidly as possible. In areas where air pollution levels already are relatively low, the attainment and maintainance of these goals should not require an extended time period. *In areas where current air pollution levels are already equal to, or better than, the air quality goals, the Secretary should not approve any implementation plan which does not provide, to the maximum extent practicable, for the continued maintenance of such ambient air quality. Once such national goals are established, deterioration of air quality should not be permitted except under circumstances where there is no available alternative.* Given the varying alternative means of preventing and controlling air pollution—including the use of the best available control technology, industrial processes, and operating practices—and care in the selection of sites for new sources, land use planning and traffic control—deterioration need not occur." (Emphasis added.)

[28] But see n. 2, p. 7, *supra*. While we are prepared to demonstrate that an HEW "Guidelines" issued under the 1967 Act (see App. A, n. 30, p. 18a) and testimony by officials of HEW (see *id.*, at 18a-19a) are consistent with our view that the 1967 Act was not intended to prevent deterioration of air which satisfied the air quality standards established thereunder, it does not seem necessary to do so in this petition. The court below recognized that the contrary "administrative interpretation" of the 1967 Act which it drew from those materials depended for its importance, in interpreting the 1970 Amendments, upon that court's understanding that the "committee reports (sic)" on the 1970 Amendments "contain express language that the principle of nondeterioration was preserved by the Clean Air Act Amendments of 1970" (App. A, at 22a; generally, at 21a-22a). Insofar as the court below relied upon "recent congressional statements" in connection with legislation which failed of passage in the 94th Congress (*id.*, at 23a), we have noted that there were also many such statements to the contrary in that Congress (p. 21, *supra*), and the fact that Congress felt the need to draft an explicit significant deterioration provision demonstrates in and of itself the insubstantiality of any reliance upon the "protect and enhance" clause as a basis for supporting the nondeterioration doctrine.

We will content outselves at this time with the following brief observations about that passage:

(1) The emphasized language in itself is ambiguous. It could mean one of two things: first, air that is "already equal to, or better than, the air quality goals" (*i.e.*, the national secondary standards)[29] should be maintained at a level that is either equal to or better than the national standards (*i.e.*, at a level which satisfies those standards) unless there is no available alternative; or, second, air that is "better than" should be maintained at a level which is better than, and air that is "equal to" should be maintained at a level that is "equal to" the national standards, unless there is no available alternative.

(2) The second interpretation proves too much, insofar as the significant deterioration regulations are concerned, as it would not permit any deterioration except where there "is no available alternative." This reading would not permit "incremental" deterioration in any of the classes or the possibility of a Class III redesignation where deterioration down to federal

[29] Among other things, the bill that was enacted substituted the term "secondary ambient air quality standards" for the term "national goals" which was used in the Senate bill.

standards is contemplated by the present regulations. See pp. 13-14, *supra*.

(3) The entire context of the above-quoted passage indicates that the first interpretation—air quality that is equal to or better than the federal standards should be maintained at a level which is either equal to or better than such standards—was intended. The passage as a whole is directed to and elaborates upon "the Committee's view that," while the "bill would not require the attainment of air quality goals within a specified time period," nonetheless "progress in this direction should be made as rapidly as possible." Further, that passage appears in a section (pp. 9-11) devoted to the establishment of the national primary and secondary standards or goals at levels sufficient to protect the public health and welfare. The provisions of the bill relating to implementation plans are discussed in another section of the Report (pp. 11-15), which states, among other things, that the "bill . . . would require that each State . . . adopt a plan for the *implementation of standards at least as stringent as the national ambient air quality standards*" (p. 12; emphasis added), and that the Secretary of HEW [30] would have "the authority to replace all or any portion of any implementation plan submitted by a State *where the attainment of the nationally* [*sic*] *ambient air quality standard within the time required is not provided*" (p. 14; emphasis added). See, also, the analysis at pp. 54-59 of the Report of § 6 of the Senate bill (which contained the provisions in question).

[30] While the Senate bill provided for the Secretary of HEW to exercise the Federal functions provided for therein, the bill enacted in 1970 provided that the Administrator of EPA would exercise those functions.

(4) The passage in question, whatever its meaning, does not purport to be based upon, or even refer to, the "protect and enhance" purpose clause in § 101 (b)(1) of the Act. Insofar as we are aware, no member of Congress ever asserted, until after *Sierra Club* v. *Ruckelshaus* was instituted, that that clause embodied a policy to prevent significant deterioration.

(5) The passage in question comprises one paragraph (about one-fourth of a page) of a Senate Report that is 129 pages long. No one has even claimed that there is a comparable passage in H. Rep. No. 91-1146, 91st Cong., 2d Sess. (1970), or in the Conference Report, H. Rep. No. 91-1783, 91st Cong., 2d Sess. (1970), or in the extensive floor debates that preceded enactment of the 1970 Amendments. When this is contrasted with the lengthy discussion of the significant deterioration provisions of the legislation proposed in the immediately past Congress, both in committee reports and floor debate, and the general recognition of the complexity, controversial nature and importance of any such provisions (see pp. 20-24, *supra*), it seems inconceivable that the Congress could have intended State implementation plans to contain such provisions when it enacted the 1970 Amendments.

In view of the considerations outlined above, we think it plain that a single passage in a committee report, which in itself is at least ambiguous, is much too slim (if not nonexistent as) a foundation to support the superstructure of the significant deterioration regulations, overriding not only the plain language of § 110 of the Act but also three decisions by this Court holding that such language does indeed mean what it clearly says.

We add two further points. First, assuming that the "protect and enhance" language in the Findings and Purposes section of the Clean Air Act does embody a policy for the prevention of significant deterioration, this does not necessarily mean (as the court below seems to have assumed) that the implementation of such a policy is a function of the Federal Government. Rather, as we have demonstrated (p. 6, *supra*) and as the Court noted in *Train* (421 U.S., at 64), at all times the Clean Air Act has recognized, as it now provides in the Findings and Purposes section (§ 101(a)(3)), that "the prevention and control of air pollution at its source is the primary responsibility of States and local governments . . . ." In this regard, § 116 of the Clean Air Act as revised by the 1970 Amendments provides, in the language of S. Rep. No. 91-1196, *supra* at 15, that "States, localities . . . may adopt . . . more restrictive standards and plans . . . than required by" what is now § 110 of the Act.

Second, even assuming that the "protect and enhance" language does include both a policy of preventing significant deterioration and a Federal role in that regard, this does not necessarily mean (as the court below seems to have assumed) that such Federal role is to be exercised through EPA's disapproval of State implementation plans and promulgation of regulations amending all those plans to include significant deterioration provisions. Indeed, the Congress in the 1970 Amendments did enact the provisions in § 111 of the Act for the establishment by EPA of new source performance standards (see p. 9, *supra*) in the belief, as stated in S. Rep. No. 91-1196, *supra* at 2, that "[m]aintenance of existing high quality air is assured through provision for maximum control of

new major pollution sources." And, see, *e.g.*, *National Asphalt Pavement Association* v. *Train*, 9 ERC 1109, 1114 (D.C. Cir., July 21, 1976), and the legislative history there cited.

In sum, the decision below has decided important issues that should be reviewed and decided by this Court, and it has decided them wrongly.

CONCLUSION

For the reasons stated above, this petition for writ of certiorari should be granted.

Respectfully submitted,

Dated: October 15, 1976

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-2063

SIERRA CLUB, *Petitioner*

v.

ENVIRONMENTAL PROTECTION AGENCY ET AL.,
Respondents
THE DAYTON POWER & LIGHT CO. ET AL., *Intervenors*

No. 74-2079

SIERRA CLUB ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY ET AL.,
Respondents

No. 75-1368

PUBLIC SERVICE COMPANY OF COLORADO ET AL.,
Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent
SIERRA CLUB ET AL., *Intervenors*

No. 75-1369

UTAH POWER & LIGHT COMPANY, *Petitioner*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*
SIERRA CLUB ET AL., *Intervenors*

No. 75-1370

STATE OF NEW MEXICO EX REL. NEW MEXICO ENVIRONMENTAL IMPROVEMENT AGENCY, *Petitioner*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*
SIERRA CLUB ET AL., *Intervenors*

No. 75-1371

PACIFIC COAL GASIFICATION COMPANY ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*
SIERRA CLUB ET AL., *Intervenors*

No. 75-1372

UTAH INTERNATIONAL, INC., *Petitioner*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*
SIERRA CLUB ET AL., *Intervenors*

No. 75-1575

INDIANA-KENTUCKY ELECTRIC CORPORATION ET AL., *Petitioners*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent*
SIERRA CLUB ET AL., *Intervenors*

No. 75-1663

THE DAYTON POWER & LIGHT COMPANY ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*
SIERRA CLUB ET AL., *Intervenors*

No. 75-1664

BUCKEYE POWER, INC. ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY ET AL., *Respondents*
SIERRA CLUB ET AL., *Intervenors*

No. 75-1665

AMERICAN PETROLEUM INSTITUTE ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*
SIERRA CLUB ET AL., *Intervenors*

No. 75-1666

ALABAMA POWER COMPANY ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*
SIERRA CLUB ET AL., *Intervenors*

No. 75-1763

MONTANA POWER COMPANY ET AL., *Petitioners*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent*
SIERRA CLUB ET AL., *Intervenors*

No. 75-1764

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY ET AL., *Respondents*
SIERRA CLUB ET AL., *Intervenors*

Petitions for Review of Regulations Promulgated by the Environmental Protection Agency

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Argued June 9, 1976

Decided August 2, 1976

Before WRIGHT, ROBINSON, and WILKEY, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* WRIGHT.

WRIGHT, *Circuit Judge:*

I. INTRODUCTION

One of the primary purposes of the Clean Air Act, 42 U.S.C. § 1857 *et seq.* (1970), is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population * * *." Section 101(b)(1), 42 U.S.C. § 1857(b)(1). Pursuant to the court order in *Sierra Club v. Ruckelshaus,* 344 F.Supp. 253 (D. D.C. 1972), *aff'd per curiam,* 4 ERC 1815 (D.C. Cir. 1972), *aff'd by an equally divided Court, sub nom. Fri v. Sierra Club,* 412 U.S. 541 (1973), the Administrator of the Environmental Protection Agency (EPA) promulgated regulations designed to prevent "significant deterioration" of air quality in those areas which have air that already is cleaner than the national ambient air quality standards.[1] The regulations

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[1] The twin objectives of the Clean Air Act are to improve air quality where pollution levels do not meet national minimum standards, and to protect the quality of air that already, as in this case, is cleaner than national standards. *See* Part V-A of this opinion *infra.* Accomplishment of those objectives is to be a joint enterprise of the federal government and the states, the former providing informed guidance to the implementation efforts of the latter. *See* §§ 101(a)(3), (4) of the Act, 42 U.S.C. §§ 1857(a)(3), (4).

Section 108 of the Act, 42 U.S.C. § 1857c-3, required the Administrator of EPA to publish a list of air pollutants which have "an adverse effect on public health or welfare." The Administrator was then to promulgate national primary and secondary ambient air quality standards for those specified pollutants. National *primary* air quality standards are those "the attainment and maintenance of which * * * are requisite to protect the public health"; national *secondary* standards are those "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." Section 109,

[continued]

employ a classification scheme under which these "clean air" regions may be designated Class I, II, or III. All such areas initially are designated Class II, under which specified increments in sulfur dioxide and particulate matter pollution are considered "insignificant." A state, In-

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42 U.S.C. § 1857c-4. The Administrator has promulgated national primary and secondary air quality standards for six pollutants: sulfur dioxide, particulate matter, carbon monoxide, photochemical oxidants, hydrocarbons, and nitrogen dioxide. 40 C.F.R. §§ 50.4—50.11 (1975).

The states are charged with the duty to develop implementation plans designed to achieve the level of air quality prescribed by the national primary and secondary standards:

> Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

Section 107, 42 U.S.C. § 1857c-2. The plans are submitted to the Administrator for approval under the provisions of § 110 of the Act, 42 U.S.C. § 1857c-5 (1970), *as amended* (Supp. IV 1974). A proposed implementation plan must satisfy the requirements of § 110(a)(2)(A)-(H), 42 U.S.C. § 1857c-5(a)(2)(A)-(H), which requirements include attainment of the national primary standards within three years after approval of the plan, and attainment of the secondary standards within a "reasonable time." Section 110 (a)(2)(A), 42 U.S.C. § 1857c-5(a)(2)(A).

Section 110 also provides that the Administrator is promptly to prepare and publish his own regulations for a state if (a) it fails to submit a plan, (b) the plan "is determined by the Administrator not to be in accordance with the requirements of this section," or (c) the state fails to revise its plan pursuant to a provision required by § 110(a)(2)(H). Section 110(c)(1), 42 U.S.C. § 1857c-5(c)(1) (Supp. IV 1974). Subsection (c)(1) of § 110 also contains a conditional hearing requirement for these "replacement" implementation plans: "If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation." Subsection (a)(2)(H) requires that an implementation plan provide for revision (i) to take account of changes in either technology or the national standards and (ii) whenever the Administrator determines that the plan is inadequate to achieve the primary or secondary standards.

The basic structure described above is supplemented by § 111 of the Act, 42 U.S.C. § 1857c-6 (1970), *as amended* (Supp. IV 1974), which provides for promulgation of "standards of performance" for emission limitations of significant new sources of pollution, by categories of sources. The standards must reflect "the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated."

[2] The three named states are joined by Maine, Alabama, Colorado, Kansas, Minnesota, South Dakota, and Florida.

dian territory, or federal land may be redesignated after hearing and by application to EPA. Designation as Class I implies a region of very clean air, in which relatively small increments in air pollution would be considered significant deterioration; Class III areas are those in which deterioration of air quality to the national ambient air quality standards would be considered insignificant.

The court has heard the regulations attacked from several perspectives. Petitioner Sierra Club contends that the regulations fail, in a variety of ways, to prevent significant deterioration of existing clean air. The States of New Mexico, Wyoming, and California[2] agree in some respects with Sierra Club, but are concerned that the regulations infringe on the general regulatory authority vested in the states by the Clean Air Act. A large number of electric power companies and industrial organizations have argued that the regulations are not authorized by the Clean Air Act, that their promulgation was procedurally defective, that the allowable increments are arbitrary and capricious, and that the regulatory structure created by the regulations is unconstitutional.

We conclude that the Administrator's action is rationally based and has not been shown to be either without his authority or unconstitutional. We therefore do not disturb the regulations as promulgated.

II. Litigation History

Suit was filed in May 1972 by the Sierra Club and other environmental protection groups for a declaratory judgment that the Clean Air Act prohibited approval of state implementation plans which permitted significant deterioration of air cleaner than the national secondary standards, and for injunctive relief to prevent the Administrator from approving those portions of state implementation plans which would permit significant deterioration. District Judge John H. Pratt granted plaintiffs' motion for a preliminary injunction and declared invalid an EPA regulation [3] which had required only that state implementation plans "be adequate to prevent * * * ambient pollution levels from exceeding * * * [the applicable] secondary standard." *Sierra Club v. Ruckelshaus,* 344 F.Supp. 253 (D. D.C. 1972). The Administrator was enjoined from approving any state plan "unless he approves the state plan subject to subsequent review by him to insure that it does not permit significant deterioration of existing air quality in any portion of any state where the existing air quality is better than one or more of the secondary standards promulgated by the Administrator." [4]

As is apparent from the provisions of the Clean Air Act outlined above,[5] prohibition of significant deteriora-

[3] 40 C.F.R. § 51.12(b) (1975).

[4] *Sierra Club v. Ruckelshaus,* Civil Action No. 1031-72 (D. D.C. May 30, 1972), JA Vol. IV at 1487.

[5] *See* note 1 *supra.*

tion of air cleaner than the national standards is not an express requirement of the Act. Judge Pratt based his decision, rather, on the "protect and enhance" language of Section 101(b)(1) of the Act and on the legislative history of both the Clean Air Act of 1970 and the Air Quality Act of 1967.[6] The decision was affirmed *per curiam* by this court, 4 E.R.C. 1815 (1972), and was affirmed by an equally divided Supreme Court, *sub nom. Fri v. Sierra Club,* 412 U.S. 541 (1973).

Pursuant to that order, the Administrator reviewed and disapproved all state plans insofar as they failed to provide for prevention of significant deterioration. 37 Fed. Reg. 22836 (November 9, 1971). Four alternative sets of regulations were proposed for public comment, in an effort to determine what meaning to give the concept of "significant deterioration." [7] Final regulations were pub-

[6] The legislative history is discussed at notes 32-38 *infra.*

[7] 38 Fed. Reg. 18986 (July 16, 1973). In proposing alternative solutions, EPA posed for public debate the problem of how significant deterioration was to be defined:

> The basis for preventing significant deterioration * * * lies in a desire to protect aesthetic, scenic, and recreational values, particularly in rural areas, and in concern that some air pollutants may have adverse effects that have not been documented in such a way as to permit their consideration in the formation of national ambient air quality scientific data on the kind and extent of adverse effects of air pollution levels below the secondary standards, significant deterioration must necessarily be defined without a direct quantitative relationship to specific adverse effects on public health and welfare.
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> * * * *
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> The relative significance of air quality versus economic growth may be a variable dependent upon regional conditions. For example, relatively minor deterioration of the aesthetic quality of the air may be very significant in a recreational area in which great pride (and economic development) is derived from the "clean air." Conversely, in areas with severe unemployment and little recreational value, the same level of de-

[continued]

lished December 5, 1974, 39 Fed. Reg. 42509, and were amended slightly on January 16, 1975 (40 Fed. Reg. 2802), June 12, 1975 (40 Fed. Reg. 25004), and September 10, 1975 (40 Fed. Reg. 42011).

III. The Regulations

In promulgating final regulations[8] EPA was concerned primarily with the meaning of "significant deterioration." As it stated in the discussion preceding the new regulations:

> Most of the comments implicitly recognized that there is a need to develop resources in presently clean areas of the country, and that significant deterioration regulations should not preclude all growth, but should ensure that growth occurs in an environmentally acceptable manner. However, there are some areas, such as national parks, where any deterioration would probably be viewed as significant. A single nationwide deterioration increment would not be able to accommodate these two situations.

39 Fed. Reg. at 42520. The solution was to prescribe, for those areas with air cleaner than the national standards, three classes of allowable total increments above the levels of particulate matter and sulfur dioxide pollution as of January 1, 1975, with the intention that each area could

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> terioration might very well be considered "insignificant" in comparison to the favorable impact of new industrial growth with resultant employment and other economic opportunities. Accordingly, the definition of what constitutes significant deterioration must be accomplished in a manner to minimize the imposition of inequitable regulations on different segments of the Nation.

Id. at 18987, 18988.

[8] "Prevention of Significant Air Quality Deterioration," 39 Fed. Reg. 42510 (Dec. 5, 1974).

determine which class would prevent significant deterioration of its air in light of the area's air quality and social and economic needs and objectives:

> Class I applie[s] to areas in which practically any change in air quality would be considered significant; Class II applie[s] to areas in which deterioration normally accompanying moderate well-controlled growth would be considered insignificant; and Class III applie[s] to those areas in which deterioration up to the national standards would be considered insignificant.
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> * * * *
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> Since the consideration of "air quality factors" alone essentially leads to an arbitrary definition of what is "significant," this term only has meaning when the economic and social implications are analyzed and considered. Therefore, the Administrator believes that it is most important to recognize and consider these implications, since the consideration of air quality factors alone provides no basis for selecting one deterioration increment over another.

Id. The regulations, 40 C.F.R. §§ 52.01(d), (f), and 52.21 (1975), were promulgated as amendments to the disapproved state implementation plans.[9]

All areas initially are designated Class II,[10] and may be redesignated by proposal of a state, federal land manager,

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[9] Part 52 of 40 C.F.R. "sets forth the Administrator's approval and disapproval of State plans and the Administrator's promulgation of such plans or portions thereof." 40 C.F.R. § 52.02(a) (1975). Each state implementation plan has been amended to incorporate by reference the new regulations. *See, e.g.*, 40 C.F.R. §§ 52.96 (Alaska), 52.144 (Arizona), 52.181 (Arkansas).

[10] 40 C.F.R. § 52.21(c)(3)(i) (1975).

or Indian governing body where the state has not assumed jurisdiction over Indian lands.[11] Federal land may be designated only to a more restrictive classification than that provided by the state(s) in which it is located.[12]

A state may redesignate if a hearing is held after notice to states, federal land managers, and Indian governing bodies that may be affected,[13] and if the proposed redesignation is based on the record of the hearing,

> which must reflect the basis for the proposed redesignation, including consideration of (1) growth anticipated in the area, (2) the social, environmental, and economic effects of such redesignation upon the areas being proposed for redesignation and upon other areas and States, and (3) any impacts of such proposed redesignation upon regional or national interests.[14]

A redesignation is to be approved if the state has complied with the listed requirements, has not "arbitrarily and capriciously disregarded" the considerations listed in the passage quoted above, and has undertaken the new source review requirements of Sections 52.21(d) and (e), discussed below.[15] 40 C.F.R. § 52.21(c)(3)(vi)(*a*) (1975).[16]

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[11] 40 C.F.R. §§ 52.21(c)(3)(ii), (iii), (iv), (v) (1975).

[12] 40 C.F.R. § 52.21(c)(iv) (1975).

[13] 40 C.F.R. §§ 52.21(c)(3)(ii) (*a*)-(*c*) (1975).

[14] 40 C.F.R. § 52.21(c)(3)(ii)(*d*) (1975).

[15] *See* discussion at notes 20-23 *infra*.

[16] In the event of a protest by a state or Indian governing body to a redesignation proposed by another state, federal land manager, or Indian governing body, the Administrator may approve the proposal "only if he determines that in his judgment the redesignation appropriately balances considerations of growth anticipated in the area proposed to be redesignated; the social, environmental and economic effects of such redesignation upon the area being redesignated and upon other areas and States; and any impacts upon regional or national interests." 40 C.F.R. § 52.21(c)(3)(vi)(*e*) (1975).

Federal land managers and Indian governing bodies are subject to requirements parallel to those imposed on the states, with the added requirement that they consult with the state(s) in which they are located.[17]

If an area is designated as Class I or II, the allowable incremental pollution is measured from January 1, 1975.[18] No increments are specified for Class III; areas so designated are required to meet only the national secondary standards.[19]

Enforcement of the limitation on incremental pollution is accomplished partly through preconstruction review of 19 categories of stationary sources considered to be significant sources of pollution.[20] Permission to construct or to modify significantly one of the listed stationary sources is conditioned on a showing that the source's emissions, together with all other increases or decreases in emissions in the area since January 1, 1975, will not violate the air

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[17] 40 C.F.R. §§ 52.21(c)(3)(iv), (v) (1975).

[18] 40 C.F.R. § 52.21(c)(2)(i) (1975). The increments are prescribed in the following table, included in the cited subsection:

Pollutant	Class I (ug/m³)	Class II
Particulate matter:		
Annual geometric mean	5	10
24-hr. maximum	10	30
Sulfur dioxide:		
Annual arithmetic mean	2	15
24-hr. maximum	5	100
3-hr. maximum	25	700

[19] 40 C.F.R. § 52.21(c)(2)(ii) (1975).

[20] 40 C.F.R. § 52.21(d)(1)(i)-(xix) (1975).

quality increments applicable to *any* area.[21] The source also must meet an emission limit, specified by the Administrator, "which represents that level of emission reduction which would be achieved by the application of best available control technology, as defined in § 52.01(f), for particulate matter and sulfur dioxide."[22] Preconstruction review of new proposed sources will be conducted by the Administrator or, by delegation, by the individual states.[23]

Last, it should be noted that the described classification scheme is no procrustean bed to which all states are to be bound. The states retain the option of proposing an alternative method of preventing significant deterioration of air quality, thereby abandoning the regulatory framework described by the regulations under review. As EPA stated in proposing regulations:

> The State plans need not be identical to the regulations proposed herein, but should be developed to accommodate more appropriately individual conditions and procedures unique to specific State and local areas. States are urged to develop and submit individual plans as revisions to State Implementation Plans as soon as possible. When individual State Implementation Plan revisions are approved as adequate to prevent significant deterioration of air quality, the applicability of the regulations proposed herein will be withdrawn for that State.

[21] 40 C.F.R. § 52.21(d)(2)(i) (1975), *as amended*, 40 Fed. Reg. 42011 (Sept. 10, 1975).

[22] 40 C.F.R. § 52.21(d)(2)(ii) (1975). "Best available control technology" is defined as equivalent to the new source performance standards promulgated under § 111 of the Clean Air Act, 42 U.S.C. § 1857c-6. *See* discussion at note 1 *supra*. If no standard of performance has been promulgated for a source, best available control technology is determined on a case-by-case basis. 40 C.F.R. § 52.01(f) (1975).

[23] 40 C.F.R. § 52.21(f) (1975). *See also* 40 C.F.R. § 52.21(d)(4) (1975), which provides for cooperation between the Administrator and federal land managers for review of new sources on federal land, and between the Administrator and the Secretary of the Interior as to lands over which a state has not assumed jurisdiction.

39 Fed. Reg. at 31000 (August 27, 1974).

IV. Standard of Review

It is well settled that EPA rulemaking is reviewed under Section 10 of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)-(D) (1970). *Ethyl Corp. v. EPA*, —— U.S. App.D.C. ——, ——, —— F.2d ——, ——, slip op. at 66-74 (No. 73-2205, decided March 19, 1976). We must determine whether the Agency's action, findings, and conclusions are invalid as procedurally defective (§ 706(2)(D)), in excess of legislative authority (§ 706(2)(C)), unconstitutional (§ 706(2)(B)), or "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (§ 706(2)(A)).

The "arbitrary and capricious" standard requires that agency action be affirmed if a rational basis exists therefor[24]; it is not for us to inquire into whether the decision is wise as a matter of policy, for that is left to the discretion and developed expertise of the agency.[25] The Supreme Court has cautioned, with respect to review under the "arbitrary and capricious" standard, that the reviewing court is limited to deciding whether there has been a "clear error of judgment * * *. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to*

[24] *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 290 (1974).

[25] *National Ass'n of Food Chains, Inc. v. ICC*, —— U.S. App. D.C. ——, ——, —— F.2d ——, ——, slip op. at 13 (No. 75-1471, decided May 18, 1976) (*per curiam*).

Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1972). *See Ethyl Corp. v. EPA, supra,* —— U.S.App.D.C. at —— n.74, —— F.2d at —— n.74, slip op. at 69 n.74.

We therefore must assure ourselves that the Agency has presented a rational basis for its decision [26] ; that it "demonstrably has given reasoned consideration to the issues, and has reached a result which rationally flows from its conclusions." [27]

V. Argument

A. Should *Sierra Club* v. *Ruckelshaus* be rejected on further consideration?

The question whether the Clean Air Act should be interpreted to prohibit significant deterioration of air cleaner than the national standards is necessarily the first level of analysis. Although this issue was decided by the earlier *Sierra Club v. Ruckelhaus* litigation, it is contended by the industrial petitioners (1) that the decision was clearly wrong on the merits and should be reconsidered and (2) that the later decision in *Train v. NRDC,* 421 U.S. 60 (1975), and enactment of the Energy Supply and Environmental Coordination Act of 1974, 88 Stat. 246, are inconsistent with the prior decision in *Sierra Club v. Ruckelshaus.*

The first argument obviously would require the clearest showing that *Sierra Club v. Ruckelshaus* was incorrect-

[26] We note that the basis of agency action must be provided *by the agency;* an order "cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act. There must be such a responsible finding • • •." *SEC v. Chenery Corp.,* 318 U.S. 80, 94 (1943) ; *see National Ass'n of Food Chains, Inc. v. ICC, supra* note 25, —— U.S.App. D.C. at ——, —— F.2d at ——, slip op. at 12-13.

[27] *National Ass'n of Food Chains, Inc. v. ICC, supra* note 25, —— U.S.App.D.C. at ——, —— F.2d at ——, slip op. at 14.

ly decided, since Judge Pratt's decision was affirmed by both another panel of this court and an equally divided Supreme Court. It is posited that neither the "protect and enhance" language of Section 101(b)(1) nor the legislative history of the Clean Air Act need be read to impose a requirement of nondeterioration; petitioners then point out that, to the contrary, a 1970 amendment to the Act, Section 110(a)(2), 42 U.S.C. § 1857c-5(a)(2), states that the Administrator "shall approve" a state implementation plan which meets the criteria listed in that section, none of which implies a nondeterioration standard. The conclusion advanced by petitioners is that the judicially-created requirement of nondeterioration violates this plain language of the 1970 amendment.

When a specific provision of a total statutory scheme reasonably may be construed to be in conflict with the congressional purpose expressed in the act, our first task is to examine the act's legislative history to determine whether the specific provision is reconcilable and consistent with the intent of Congress.[28] We find, in the legislative history of the Clean Air Act of 1970, a clear understanding that the Act embodied a pre-existing policy of nondeterioration of air cleaner than the national standards. Inasmuch as we find no support for the proposition that the addition of Section 110(a)(2) was intended to limit that policy in any way, we reaffirm our prior holding in *Sierra Club v. Ruckelshaus.*

The "protect and enhance" language of the Clear Air Act was added by the Air Quality Act of 1967, 81 Stat. 485.[29] The administrative interpretation and, to a lesser

[28] *See FTC v. Fred Meyer, Inc.,* 390 U.S. 341, 349 (1968) : "[W]e cannot, in the absence of an unmistakable directive, construe the Act in a manner which runs counter to the broad goals which Congress intended it to effectuate."

[29] *Air Quality Act of 1967,* S. Rep. No. 91-403, 90th Cong., 1st Sess. 40 (1967).

degree, the legislative history of the Air Quality Act expressed a policy of nondeterioration,[30] and that policy appears generally to have been accepted at the time of the addition of the Clean Air Act amendments of 1970.

In the Senate hearings on the Clean Air Act amendments of 1970, the officials charged with implementation of the 1967 Act expressed their clear understanding that the "protect and enhance" language of Section 101 mandated the policy of nondeterioration. HEW Secretary Robert H. Finch testified as follows in a statement presented by Undersecretary John Veneman:

> In their implementation plans, the States would have to spell out the measures to be taken to achieve

[30] *Sierra Club v. Ruckelshaus*, 344 F.Supp. 253, 255 (D. D.C. 1972); ENVIRONMENTAL LAW INSTITUTE, FEDERAL ENVIRONMENTAL LAW, 1974 at 1077-1080. The Senate committee report on the Air Quality Act emphasized that the Act would apply to all areas of the country, and quoted Senator Muskie for the proposition that it was necessary "to assure the lessening of current levels of pollution and to prevent further environmental deterioration in the future." *Air Quality Act of 1967, supra* note 29, at 2-3, 8.

The Act was administered by the National Air Pollution Control Administration of the Department of Health, Education and Welfare, which formalized the concept of nondeterioration in its Guidelines for the Development of Air Quality Standards and Implementation Plans, Part I, § 1.51 at 7 (1969):

> "[A]n explicit purpose of the Act is "to *protect* and *enhance* the quality of the Nation's air resources" (emphasis added). Air quality standards which, even if fully implemented, would result in significant deterioration of air quality in any substantial portion of an air quality control region clearly would conflict with this expressed purpose of the law.

See generally, Non-Degradation—Clean Air Act and Amendments Held to Mandate a Policy Prohibiting Significant Deterioration of Air Quality in Areas of Relatively Clean Air, 2 FORDHAM URBAN L. J. 136 (1973) (hereinafter *Clean Air Act Held to Prohibit Significant Deterioration*); *The Clean Air Act and the Concept of Non-Degradation: Sierra Club v. Ruckelshaus*, 2 ECOLOGY L. Q. 801 (1971) (hereinafter *The Concept of Non-Degradation*).

> and preserve national air quality standards. As I have indicated, they would have the option of designing their implementation plans to achieve or preserve higher than national quality levels, if they wished to do so.
>
> As you know, one of the express purposes of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources" * * *. Accordingly, it has been and will continue to be our view that implementation plans that would permit significant deterioration of air quality in any area would be in conflict with this provision. We shall continue to expect States to maintain air of good quality where it now exists.

Air Pollution—1970, Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, Part I, 132-133 (1970). Undersecretary Veneman went on to state that "[i]t will continue to be our view that implementation plans that would permit significant deterioration of air quality in any area would be in conflict with the provisions of the Act. We do not intend to condone 'backsliding.' If an area has air quality which is better than the national standards, they would be required to stay there and not pollute the air ever further, even though they may be below national standards." *Id.* at 143.

The Senate committee report gave express recognition to the concept of nondeterioration, directing that

> [*i*]*n areas where current air pollution levels are already equal to, or better than, the air quality goals, the Secretary should not approve any impicmentation plan which does not provide, to the maximum extent practicable, for the continued maintenance of such ambient air quality.* Once such national goals are established, deterioration of air quality should not be

> permitted except under circumstances where there is no available alternative.

S. Rep. No. 91-1196, 91st Cong., 2d Sess. 11 (1970) (emphasis added). Quite to the contrary, however, there was no particular significance ascribed to the "shall approve" language of the section which became Section 110(a)(2). *Id.* at 11-15.

The explanation of this omission in the legislative history appears to be that the 1970 amendments were aimed at states that refused to take action to improve their air quality. The background of the 1970 amendments was described in *Train v. NRDC, supra,* 421 U.S. at 64:

> The response of the States to these manifestations of increasing congressional concern with air pollution was disappointing. Even by 1970, state planning and implementation under the Air Quality Act of 1967 had made little progress. Congress reacted by taking a stick to the States in the form of the Clean Air Amendments of 1970 * * *.

The "stick" was the group of express requirements as to the content of state implementation plans.[31] The "shall approve" language was addressed to the administrative problems that would be caused by a requirement that all states submit complying implementation plans within a

[31] "The Committee recognized that because the proposed bill would require a great deal in a short period of time and because the brevity of the provision in existing law has led to uneven and inadequate interpretation, the character of an implementation plan must be specified and the alternative methods of achievement listed. The Committee bill would require that a rigorous time sequence be met in the development of the implementation plan and would provide for the substitution of Secretarial authority if the State plan, or a portion thereof, is inadequate to attain the quality of ambient air established by the nationally promulgated ambient air quality standard." S. Rep. No. 91-1196, 91st Cong., 2d Sess. 12 (1970).

limited time; the provisions of Section 110(a) are, more than anything else, a summary of the mandatory requirements for all state implementation plans.[32] We have, however, found no indication, nor have we been cited to any indication in the legislative history, that Section 110 was intended in any way to vitiate the nondeterioration mandate contained in the Senate report.[33]

This court has recently cautioned that a failure by Congress expressly to reject the administrative construction of an act need not, without more, indicate congressional acquiescence in the agency interpretation.[34] In *Chisholm v. FCC,* —— U.S. App.D.C. ——, —— F.2d —— (No. 75-1951, decided April 12, 1976), the court refused to ascribe significance to congressional inaction when it appeared that Congress was "aware" of the administrative interpreta-

[32] *See* note 31 *supra.*

[33] *See The Concept of Non-Degradation, supra* note 30, at 819:

> The legislative history does support the contention that the principle of non-degradation is implicit in the Clean Air Act. It resolves the vagueness of both the purpose clause and section 110. Although the history of the 1967 Act conveys an ambiguous picture of the legislative intent, the history of both the 1970 Amendments and the later Implementation Hearings clearly indicates that Congress confronted the complexities of air pollution control and undertook a program designed to prevent the deterioration of clean air.

[34] *Chisholm v. FCC,* —— U.S.App.D.C. ——, ——, —— F.2d ——, ——, slip op. at 26 (No. 75-1951, decided April 12, 1976):

> We begin by noting that attributing legal significance to Congressional inaction is a dangerous business * * *. The Supreme Court has said that Congressional failure to repudiate particular decisions "frequently betokens unawareness, preoccupation, or paralysis" rather than conscious choice, *Zuber v. Allen,* 396 U.S. 168, 185-86 n. 21 (1969), and "affords the most dubious foundation for drawing positive inferences," *United States v. Price,* 361 U.S. 304, 310-11 (1960) (Harlan, J.).

tion only "in a technical sense." —— U.S. App.D.C. at ——, —— F.2d at ——, slip op. at 27. We are not presented with that situation. Not only was the Agency's interpretation of the Air Quality Act of 1967 as mandating prevention of significant deterioration clearly before the Congress in 1970, but the committee reports contain express language that the principle of nondeterioration was preserved by the Clean Air Act Amendments of 1970.

This sort of express congressional recognition of the implementing agency's statutory construction can be extremely significant in interpreting legislative intent. In *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), for instance, the Court found approval of a long-standing administrative interpretation in Congress' studied inaction:

> In addition to the importance of legislative history, a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change. In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.

416 U.S. at 274-275. The Court reached similar results in *Zemel v. Rusk*, 381 U.S. 1, 11 (1965) (administration of Passport Act of 1926); *C.I.R. v. Estate of Noel*, 380 U.S. 678, 682 (1965); *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 365-366 (1951); *Helvering v. R.J. Reynolds Tobacco Co.*, 306 U.S. 110, 114-225 (1939); and *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 313 (1933), among others.

In the instant case there is every indication that Congress intended in 1970 to continue a policy of prevention of significant deterioration of air quality. In addition, we find nothing in the legislative history to indicate that Congress had any desire or intention that the 1970 amendments hinder the fight against air pollution by voiding the principle of nondeterioration.

It is significant in this regard that recent congressional statements have supported the historic existence of a requirement of nondeterioration. The report of the House Committee on Interstate and Foreign Commerce on the proposed Clean Air Act Amendments of 1976 (H.R. Rep. No. 94-1175, May 15, 1976) endorses a new statutory definition of nondeterioration, commenting that "[t]he Committee has developed this section to provide clearer definition of the nearly decade-old policy (reflected in section 101 (b) of the Act) that significant deterioration of clean air must be avoided, and to provide more specific congressional guidance as to how this policy is to be implemented." *Id.* at 83. A contemporaneous report of the Senate Committee on Public Works on similar proposed amendments has both restated the language quoted above from the 1970 Senate report [35] and reaffirmed the continuing policy of nondeterioration:

> A nondegradation policy was articulated first in Federal water pollution law. That was in 1965. The concept was incorporated into the 1967 Air Quality Act, which stated that a basic purpose of the Act was to "protect and enhance the quality of the Nation's air resources." That language was not altered by the 1970 Clean Air Amendments. This bill clarifies and details that policy.

Clean Air Amendments of 1976, S. Rep. No. 94-717 at 20 (March 29, 1976). It would fly in the face of overwhelming evidence of legislative intent to hold that the Clean Air Act does not contain a requirement of prevention of significant deterioration.

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[35] *See* pp. [19a-20a] *supra*.

Our belief that *Sierra Club v. Ruckelshaus* was decided properly is bolstered by its acceptance in a number of other circuits.[36] Petitioners suggest, however, that the later decision in *Train v. NRDC,* 421 U.S. 60 (1975), and enactment of the Energy Supply and Environmental Coordination Act of 1974, 88 STAT. 246, are necessarily inconsistent with the concept of nondeterioration of air quality. We reject both contentions.

Train v. NRDC involved construction of the "shall approve" language of Section 110(a)(3)(A),[37] which requires that the Administrator approve revisions of state plans which, after revision, meet the criteria of Section 110(a)(2). The Court held that state action which grants a variance to an individual pollution source must be approved by the Administrator if the approval will not expand the time for compliance with national primary ambient air quality standards[38] or otherwise violate the re-

[36] *See NRDC v. EPA,* 489 F.2d 390, 408 (5th Cir. 1974), *rev'd on other grounds, sub nom. Train v. NRDC,* 421 U.S. 60 (1975); *Big Rivers Electric Corp. v. EPA,* 8 ERC 1092 (6th Cir. 1975); *Union Electric Co. v. EPA,* 515 F.2d 206, 220 (8th Cir. 1975), *aff'd on other grounds,* —— U.S. ——, 44 U.S. L. WEEK 5060 (June 25, 1976); *NRDC v. EPA,* 507 F.2d 905, 913 (9th Cir. 1974). *Cf. Highland Park v. Train,* 519 F.2d 681, 685 (7th Cir. 1975).

[37] "The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph 2 [§ 110(a)(2)] and has been adopted by the State after reasonable notice and public hearings." Section 110(a)(3)(A), 42 U.S.C. § 1857c-5(a)(3)(A) (Supp. IV 1974).

[38] Section 110(a)(2)(A), 42 U.S.C. § 1857c-5(a)(2)(A) (1970):

> The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—
>
> (A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable

quirements of Section 110(a)(2). In the following passage, strongly pressed upon us by petitioners, the Court emphasized the mandatory language of Section 110(a)(2):

> The Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met. Under § 110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards.

421 U.S. at 79 (emphasis in original).[39] It is argued that this decision removes from the Administrator the discretion to disapprove a plan which complies with Section 110(a)(2), and therefore requires that *Sierra Club v. Ruckelshaus* be overturned. This argument, however, is

> but * * * in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained[.]

[39] The language was repeated in *Hancock v. Train,* —— U.S. ——, ——, 44 U.S. L. WEEK 4767, 4768 (June 7, 1976) (dictum), which concerned the obligation of federal facilities to comply with the requirements of state implementation plans.

subject to the same analysis by which we reject the argument based on Section 110(a)(2) alone. Unlike the instant case, *Train* was concerned with air pollution below the national standards, and the question was whether individual variances would prevent the states from achieving the standards within the prescribed time limits. The Supreme Court in *Train* did not consider the issue of nondeterioration, even though the decision below was based in part on *Sierra Club v. Ruckelshaus.*[40] Rather than assume, as the industrial petitioners would have us, that *Train* silently overturned the earlier divided affirmance in *Sierra Club,* we find it more reasonable to conclude that the Court did not address the issue, and we reject the argument based on *Train.*

In another recent decision, *Union Electric Co. v. EPA,* —— U.S. ——, 44 U.S. L. WEEK 5060 (June 25, 1976), the Supreme Court found challenges to state implementation plans based on economic infeasibility to be barred by the mandatory nature of Section 110(a)(2). The Court found in the legislative history of the 1970 amendments a congressional determination that clean air objectives should take precedence over claims of economic or technological infeasibility:

> As we have previously recognized, the 1970 Amendments to the Clean Air Act were a drastic remedy to what was perceived as a serious and otherwise unchecked problem of air pollution. The Amendments place the primary responsibility for formulating pollution control strategies on the States, but nonetheless subject * * * the States to strict minimum compliance requirements. These requirements are of a "technology-forcing character," *Train v. NRDC,* 421 U.S., at 91, and are expressly designed to force regulated

[40] *NRDC v. EPA, supra* note 36, 489 F.2d at 408. The *Train* decision was limited expressly to the question of approval of variances. 421 U.S. at 69-70.

> sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible.
>
> This approach is apparent on the face of § 110(a)(2). The provision sets out eight criteria that an implementation plan must satisfy, and provides that if these criteria are met and if the plan was adopted after reasonable notice and hearing, the Administrator "shall approve" the proposed state plan. The mandatory "shall" makes it quite clear that the Administrator is not to be concerned with factors other than those specified, *Train* v. *NRDC,* 421 U.S., at 71 n. 11, 79, and none of the eight factors appears to permit consideration of technological infeasibility.

—— U.S. at ——, 44 U.S. L. WEEK at 5063. Although the Court stressed the "shall approve" language of Section 110(a)(2), its construction was founded on a concern that the congressional mandate of prompt implementation of pollution control plans not be disserved. The Court was not presented with the distinct question whether the "shall approve" language of Section 110(a)(2) must be read to subvert the concomitant congressional directive that significant deteriation of air cleaner than the national standards be prevented.[41] Thus, despite the emphasis placed on (a)(2) by the opinions in *Train v. NRDC* and *Union Electric,* we do not believe the result in the instant case is controlled by either opinion.

Petitioners also rely on the Energy Supply and Environmental Coordination Act of 1974 (ESECA), which

[41] As was the case in *Train v. NRDC,* the lower court in *Union Electric* expressly had approved the concept of prevention of significant deterioration. *Union Electric Co. v. EPA, supra* note 36, 515 F.2d at 220 n.39. The Supreme Court affirmed the Court of Appeals without mentioning that issue.

was enacted to encourage stationary fuel-burning sources to convert from oil to coal, to minimize the nation's dependence on imported oil. Among other things, it (1) authorized the Federal Energy Administration to require power plants and other major fuel-burning sources to burn coal, (2) amended the Clean Air Act to provide a limited exemption from stationary source requirements to those converting facilities,[42] and (3) required the Administrator of EPA to review the implementation plan of each state and notify any state which could revise its plan as to stationary fuel-burning sources without violating the national ambient air qquality standards.[43] The ESECA is accommodated in the "significant deterioration" regulations by 40 C.F.R. § 52.21(d)(1), which exempts from preconstruction review modifications "to utilize an alternative fuel, or higher sulfur content fuel."

Although conversion to "dirtier" fuels such as coal certainly will impair both improvement and maintenance of air quality, there is no reason to believe that passage of ESECA was intended to eliminate the requirement of nondeterioration.[44] The amendment was a necessary response to the nationwide shortage of oil and natural gas, and no

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[42] Section 119, 42 U.S.C. § 1857c-10 (Supp. IV 1974).

[43] Section 110(a)(3)(B), 42 U.S.C. § 1857c-5(a)(3)(B) (Supp. IV 1974).

[44] The "purpose" section of ESECA, 15 U.S.C. § 791 (Supp. IV 1974), is as follows:

> The purposes of this chapter are (1) to provide for a means to assist in meeting the essential needs of the United States for fuels, *in a manner which is consistent, to the fullest extent practicable, with existing national commitments to protect and improve the environment,* and (2) to provide requirements for reports respecting energy resources.

(Emphasis added.)

reason has been presented for ascribing to it a greater significance.[45]

We therefore find no substantial reason to question under ESECA or *Train,* the continuing validity of *Sierra Club v. Ruckelshaus,* and we proceed to the substance of the regulations under review using that decision as our guide.

B. Are the regulations invalid on the ground that only two of the six primary air pollutants are considered?

The regulations provide for control only of particulate matter and sulfur dioxide emissions,[46] whereas the Administrator also has identified carbon monoxide, nitrogen oxides, hydrocarbons, and photochemical oxidents as air pollutants which have an adverse effect on public health or welfare.[47] It is contended that the regulations violate the District Court's order in *Sierra Club v. Ruckelshaus* by failing to prevent significant deterioration of air quality with respect to those four pollutants.[48]

EPA has responded that the interrelationships among those four pollutants, and the relationships between in-

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[45] We also reject the argument that it is "unfair" to count the increased emissions from a source that is converted to coal against the allowable pollution increment for the area, since that modification is exempted from preconstruction review. We see no reason why a state in which major utilities have been forced to convert to coal may not choose to impose commensurately stricter standards on the remainder of the area.

[46] *See* note 18 *supra.*

[47] 40 C.F.R. §§ 50.8-50.11 (1975).

[48] The order required that the Administrator "prepare and publish proposed regulations, pursuant to 42 U.S.C. § 1857c-5(c), as to any state plan which he finds, on the basis of his review, either permits the significant deterioration of existing air quality in any portion of any state or fails to take the measures necessary to prevent such significant deterioration." *Sierra Club v. Ruckelshaus,* Civil Action No. 1031-72 (D. D.C. May 30, 1972).

cremental increases in those pollutants and deterioration of air quality, are poorly understood and cannot be determined with any reasonable degree of accuracy:

> These [four pollutants] are commonly referred to as "automotive pollutants," because the automobile is the major source of each of them * * *. The first three (HC, NO_2, and O_x) are also known as "photochemical" or "reactive" pollutants, because under the influence of sunlight, they enter into a complex chemical reaction in the atmosphere. * * * The rate at which the reaction occurs depends on a number of variables, including temperature, humidity, solar intensity, and the concentrations of the input pollutants. * * *
>
> The chief reason for excluding photochemical pollutants from these regulations is that the relationship between the emission of HC and oxides of nitrogen, on the one hand, and the resulting ambient levels of the harmful pollutants. O_x and NO_2, on the other, is very poorly understood. The only method for relating emissions to air quality for these pollutants is the "area-wide proportional model." This model assumes, as its name suggests, that ambient pollutant levels are proportional to total emissions. The model is useful only in areas where ambient pollutant levels are substantial and well-monitored, as in urban areas with smog problems. * * * But the proportional model cannot be used to regulate air quality deterioration in clean-air areas. This is because the assumptions underlying the model do not hold in clean-air areas, and also because it is not possible to make accurate measurements of ambient levels of photochemical pollutants that are substantially below the levels of the national standards.

Br. for respondent at 32-33 (footnote omitted), *elucidating,* 39 Fed. Reg. 31006 (August 27, 1974); 39 Fed. Reg.

42511 (December 5, 1974); *Technical Support Document—EPA Regulations for Preventing the Significant Deterioration of Air Quality,* U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards (January 1975), at 21-27 (JA 117-123). EPA concluded that existing technology "is inappropriate for analyzing the incremental impact of individual new sources" with respect to the four "automotive pollutants," and that "[a]t this time, the only practical approach for dealing with these pollutants appears to be to minimize emissions as much as possible." 39 Fed. Reg. 42511 (December 5, 1974). EPA further has contended that ongoing programs toward reduction of automotive emissions "are adequate to prevent any significant deterioration due to sources of carbon monoxide, hydrocarbons or nitrogen oxides."[49]

Petitioners have emphasized that the four omitted pollutants can have extremely adverse effects on public health and welfare, and have noted that they are emitted by stationary sources as well as by moving vehicles. Petitioners have not, however, directly clashed with EPA's contention that it does not have technology or modeling techniques rationally to regulate emissions on a case-by-case basis. This is the type of policy decision in which the Agency's developed expertise is heavily implicated, and with which the court will not tamper so long as the decision was rational and based on consideration of the relevant factors. *Ethyl Corp. v. EPA, supra,* —— U.S. App.D.C. at ——-——, —— F.2d at ——-——, slip op. at 66-74. Given the absence of any direct denials of EPA's assertions on this point, the Agency is entitled to claim the presumption of validity which attends its actions. *Id.,* slip op. at 68. We therefore hold that EPA did not act unlawfully in excluding from its regulations the four "automotive pollutants."

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[49] 39 Fed. Reg. 31006 (Aug. 27, 1974).

C. Are Class II and Class III invalid as permitting significant deterioration of air quality?

D. Is it unlawful to make determinations as to permissible air quality deterioration on the basis of considerations other than air quality?

It is argued by Sierra Club that Classes II and III, by permitting increases in sulfur dioxide and particulate matter pollution to levels which in some areas may be many times present concentrations, allow significant deterioration of air quality. The "significance" is primarily a matter of the numbers involved; although evidence has been presented that levels of pollution below the national secondary standards may have adverse health effects,[50] it is for the Administrator rather than the courts to determine that the national secondary standards no longer can be said to protect the public from "any known or anticipated adverse effects" of a pollutant. The question of significance thus leads by implication to a second line of argument—that it is unlawful to consider deterioration of air quality "insignificant" simply because it accompanies normal, controlled economic development.

EPA recognized, in developing the concept of "significant deterioration" pursuant to Judge Pratt's order, that "[p]ending the development of adequate scientific data on the kind and extent of adverse effects of air pollutant levels below the secondary standards, significant deterioration must necessarily be defined without a direct quantitative relationship to specific adverse effects on public health and welfare." 39 Fed. Reg. 18987 (July 16, 1973). It therefore determined that each state must determine what level of

[50] Br. for petitioners Sierra Club *et al.*, No. 74-2063, at 18-20. *See also Clean Air Act Amendments of 1976,* Report of the Senate Committee on Public Works, S. Rep. No. 94-717 at 19-27 (March 29, 1976); *Clean Air Act Amendments of 1976,* Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 94-1175 at 83-116 (May 15, 1976).

incremental pollution, taking into account the air quality and social and economic needs and objectives of the area, would be "significant deterioration" of its air quality.[51]

In that context, it was a rational policy decision that the significance of deterioration of air quality should be determined by a qualitative balancing of clean air considerations against the competing demands of economic growth, population expansion, and development of alternative sources of energy. The approach provides a workable definition of significant deterioration which neither stifles necessary economic development nor permits unregulated deterioration to the national standards.[52] We therefore find that EPA acted within the discretion it is granted as to matters of policy [53] in choosing this design to prevent significant deterioration of air quality.

We may state our belief, as a general overview at this point, that for the most part it somewhat misses the mark to raise objections to the specific emission limits of the regulations under review. EPA has emphasized that the individual states are free to conceive and adopt their own methods of preventing significant deterioration. A state may use EPA's system to classify itself as industrial-metropolitan (Class III), as anticipating normal economic growth (II), or as desirous of protecting its clean air (I). But it also may develop its own scheme,

[51] *See* pp. [10a-11a] *supra.*

[52] EPA acknowledges that all states theoretically could reclassify to Class III, thereby permitting unregulated deterioration to the national standards. It asks that the states not "arbitrarily and capriciously" disregard its outlined considerations before redesignating areas. 40 C.F.R. § 52.21(c)(3)(vi)(*a*).

[53] "However formal the type of agency proceeding, an agency's policy choices are reviewed under the arbitrary and capricious standard, which asks merely whether the policy choice is rationally connected to its factual basis." *Judicial Review of the Facts in Informal Rulemaking: A Proposed Standard,* 84 YALE L. J. 1750, 1751 (1975).

based on its own needs, so long as the regulatory structure prevents significant deterioration of air cleaner than the national standards. Given the broad power vested in the states to alter or amend these regulations, we find little merit in objections to the specifics of the classification scheme itself.

E. Has the effective date of the regulations been postponed unlawfully beyond the date contemplated by the Clean Air Act?

The Clean Air Act of 1970 imposed a series of time limits for the various steps leading up to approval of state implementation plans. Under that timetable regulations should have become effective by the middle of 1972.[54]

The regulations employ two later effective dates. First, emissions increments are measured from a January 1, 1975 baseline, and all sources for which "approval" is given after that date will have their emissions counted against the allowable increment for the region. 40 C.F.R. § 52.21 (d)(2)(i) (1975). Second, preconstruction review is provided only for sources which have "not commenced construction or modification prior to June 1, 1975." 40 C.F.R. § 52.21(d)(1) (1975). " 'Commenced' means that an owner or operator has undertaken a continuous program of con-

[54] The Clean Air Act Amendments of 1970 were added on Dec. 31, 1970, 84 STAT. 1677. The Administrator was given 90 days in which to propose and promulgate national primary and secondary ambient air quality standards. Section 109(a)(1)(B), 42 U.S.C. § 1857c-4(a)(1)(B). The states then were given nine months to submit proposed implementation plans to the Administrator, § 110 (a)(1), 42 U.S.C. § 1857c-5(a)(1), and the Administrator had four months to approve or disapprove the plans. Section 110(a)(2), 42 U.S.C. § 1857c-5(a)(2). The Administrator was to "promptly prepare and publish" implementation plans for states which failed to submit a complying plan or which failed to revise a plan after 60 days notice. Section 110(c), 42 U.S.C § 1857c-5(c). The target date for effectiveness of state implementation plans was therefore mid-1972.

struction or modification or that an owner or operator has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification." 40 C.F.R. § 52.21(b)(7) (1975). *Compare* 40 C.F.R. § 52.01(b) (1975). All later-commenced source construction must be reviewed for compliance with new source performance standards and for a determination that construction will not cause the pollution increments of any area to be violated. 40 C.F.R. § 52.21 (d)(2) (1975), *as amended*, 40 Fed. Reg. 42011 (September 10, 1975).

We are asked to hold that sources for which construction was commenced after mid-1972 must be counted against the allowable pollution increments for the various regions. EPA answers that inclusion of the earlier construction would limit practical use of the regulations to regulate future development. We accept the latter position. Whatever the effect of past construction has been upon present pollution, each state must determine what will be appropriate for future air quality and economic development. So long as any state may choose to limit future development to compensate for excessive past pollution, the choice of starting dates for the applicability of the regulations appears to be irrelevant.[55] For the same reason we do not believe EPA acted unreasonably in failing to count increases in pollution since 1972 against the allowable increments. It was a rational policy decision to limit the instant regulations to prospective concerns only.

F. Is it arbitrary and capricious to review proposed construction of stationary sources on the basis of

[55] Similarly, we find no ground for objection to the manner in which EPA has defined commencement of construction. 40 C.F.R. § 52.21(b)(7) (1975). Even if a source on which construction has "commenced" is not subject to preconstruction review, its emissions may be considered in choosing the appropriate pollution increment to be applied to the area.

compliance with the New Source Performance Standards, rather than on the basis of Best Available Control Technology on a case-by-case basis?

G. Was the Administrator required to provide for preconstruction review of all sources, rather than for "significant" sources only?

40 C.F.R. § 52.21 (d)(ii) (1975) requires that new sources which are subject to preconstruction review meet the level of emissions that would be achieved by application of the Best Available Control Technology (BACT); Section 52.01 (f) defines BACT as equivalent to the New Source Performance Standards (NSPS) promulgated under Section 111 of the Clean Air Act, 42 U.S.C. § 1857c-6 (1970), *amended* (Supp. IV 1974), when those standards are available. If no NSPS has been established for a category of sources, preconstruction review of emission reduction systems is done on a case-by-case basis. 40 C.F.R. §§ 52.21(d)(2)(ii), 52.01(f) (1975). The Sierra Club posits that the NSPS guidelines, defined by Section 111 as "the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated," are a "lowest common denominator"-based group and are inconsistent with the policy of nondeterioration.

We accept EPA's response that case-by-case review of all new sources would not only be unworkable, but would undermine Section 111 by limiting its application of NSPS to those areas which have not yet achieved the national secondary standards. It appears, in addition, that application of NSPS rather than BACT will not of necessity lead to more total pollution; a given area still is limited to the specified increment for its classification, and the use of a less effective emission reduction system by one new statutory source will simply use up more of the allowable

increment and limit opportunities for other proposed new sources. This trade-off, between types of control systems and opportunities for new source construction, is best left to the states, which by delegation will administer the preconstruction review. As the Supreme Court held in *Train v. NRDC, supra,* "so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." 421 U.S. at 79. We therefore hold that the use of NSPS is rational and in accord with the Clean Air Act.

An additional challenge to the procedures for preconstruction review is based on the allegedly unlawful limitation of review to 19 specified categories of sources.[56] We

[56] The 19 listed categories are:

(i) Fossil-Fuel Steam Electric Plants of more than 1000 million B.T.U. per hour heat input.
(ii) Coal Cleaning Plants.
(iii) Kraft Pulp Mills.
(iv) Portland Cement Plants.
(v) Primary Zinc Smelters.
(vi) Iron and Steel Mills.
(vii) Primary Aluminum Ore Reduction Plants.
(viii) Primary Copper Smelters.
(ix) Municipal Incinerators capable of charging more than 250 tons of refuse per 24 hour day.
(x) Sulfuric Acid Plants.
(xi) Petroleum Refineries.
(xii) Lime Plants.
(xiii) Phosphate Rock Processing Plants.
(xiv) By-Product Coke Oven Batteries.
(xv) Sulfur Recovery Plants.
(xvi) Carbon Black Plants (furnace process).
(xvii) Primary Lead Smelters.
(xviii) Fuel Conversion Plants.
(xix) Ferroalloy production facilities commencing construction after October 5, 1975.

40 C.F.R. § 52.21(d)(1)(i)-(xix) (1975), *as amended,* 40 Fed. Reg. 42011 (Sept. 10, 1975).

find this argument subject to the analysis presented above with respect to use of NSPS rather than BACT. Review of every new source of pollution clearly would be impossible since every gas- or oil-heated house is a source of some pollution. The decision to review only these sources which emit more than 25 pounds per hour of sulfur dioxide or particulate matter [57] does not mean there will of necessity be more total pollution; it means only that a large number of minor sources could use up the area's allowable increment and thereby preclude construction of new major sources of pollution. As EPA stated in a document explaining its regulations:

> The 18 categories which are covered by the regulation, except for fuel conversion plants, are the largest present emitters of SO_2 and TSP on a nationwide basis. Fuel conversion plants (coal gasification and liquefication, oil shale processing, etc.) were included due to their significant growth potential, particularly in presently clean areas * * *. The air quality impact of sources not included in the 18 categories is taken into account since the total air quality deterioration above the baseline is taken into account when an application to construct a new source of one of the 18 categories is reviewed.

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[57] The standard of 25 pounds/hour of emissions for addition of new categories to the list of those subject to preconstruction review was proposed on June 9, 1975 (40 Fed. Reg. 24534) and adopted Sept. 10, 1975 (40 Fed. Reg. 42011):

> [T]he criteria the Administrator intends to use in adding further sources in the future * * * are:
>
> (1) a new source performance standard for sulfur dioxide (SO_2) or particulate matter has been established for the source or any facility of the source under Part 60 of this chapter, and (2) the established new source performance standard will allow any anticipated future plant affected by the standard to emit SO_2 or particulate matter in excess of 25 pounds per hour from the affected facility or facilities when operating at maximum design capacity.

The later notice also added the 19th category, Ferroalloy production facilities.

Technical Support Document—EPA Regulations for Preventing the Significant Deterioration of Air Quality, U.S. Environmental Protection Agency, Office of Air Quality Planning & Standards (January 1975), at 27-28. Further, it is within the power of the various states to enact more stringent controls, and expanded preconstruction review procedures, should limited review lead to problems in regulating incremental pollution. We therefore hold that the regulations are not invalid insofar as provision is made for preconstruction review of only the specified categories of stationary sources.

H. Are the regulations arbitrary and capricious on the ground that the allowable increments are unrelated to anticipated adverse effects on public health and welfare?

The regulations under review establish a classification scheme which is not based on demonstrated adverse air quality effects, but rather on a balancing of concerns with air quality, economic and social needs and objectives, and development of energy sources. The industrial petitioners contend that EPA is not authorized to promulgate regulations which are not related to adverse air quality effects, and that Classes I and II therefore are invalid.

The need to prevent significant deterioration of air cleaner than the national standards, and the statutory authorization therefor, was settled by the *Sierra Club v. Ruckelshaus* litigation. It clearly is a rational legislative purpose to protect and enhance the quality of the nation's air, even in the absence of quantified evidence of adverse effects.[58]

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[58] EPA emphasized in promulgating regulations that levels of pollution below the national standards still may have some adverse effects:

> Limitations on air quality that result in cleaner air than the national ambient air quality standards cannot * * * be

[continued]

The District Court order in *Sierra Club v. Ruckelshaus* mandated that EPA enforce this legislative purpose by preventing significant deterioration of air quality, but left definition of "significant" to the Agency. EPA's solution was a definition created by its own implementation; each state's evaluation of the relative importance of the competing interests which surround continued maintenance of air quality will determine what level of deterioration would be significant for that state. The three classifications thus are not intended to represent a scientific conclusion as to what constitutes significant deterioration; rather, they are suggested frameworks for use by the states after independent evaluation. Because the regulations do not purport to be mandatory requirements based on scientific research, they properly cannot be judged by asking whether

based on any quantitative measure of harm to either public health or welfare. This is not, however, to say that there are no possible unquantified adverse effects on public health or welfare below the levels of the national standards. Examples of such unquantified effects involve the transformation of sulfur dioxide into suspended sulfates and sulfuric acid aerosols, resulting in posible effects on health, visibility, climatic changes, acidity of rain, and deterioration of materials.

Since there is no way to relate "significance" of deterioration of air quality to any adverse effects resulting from air quality levels cleaner than the national standards, EPA concluded that the determination of what is "significant" deterioration must take into account factors other than air quality alone. For example, relatively minor deterioration of the aesthetic quality of the air may be very significant in a recreational area in which great pride (and economic development) is derived from the "clean air."

Technical Support Document—EPA Regulations for Preventing the Significant Deterioration of Air Quality, U.S. Environmental Protection Agency, Office of Air Quality Planning & Standards (January 1975), at 6. *See also Clean Air Act Amendments of 1976*, Report of the Senate Committee on Public Works, S. Rep. No. 94-717 at 19-27 (March 29, 1976); *Clean Air Act Amendments of 1976*, Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 94-1175 at 83-116 (May 15, 1976).

the increments are related to demonstrated health effects. As we have noted above, any state could adopt even more stringent regulations by proposing its own revision to its implementation plan.[59]

We therefore find insubstantial the objection that the varying allowable increments presented in the instant regulations are unrelated to demonstrated adverse health effects. The regulations flow from a valid legislative goal, and we believe EPA has acted reasonably in permitting each state, in its informed discretion, to develop a workable definition of significant deterioration.

I. Are the regulations unworkable because present modeling techniques are inadequate to predict precisely how a new source will affect the ambient air?

Some petitioners[60] have objected that present computer modeling technology is inadequate to predict with precision what effect a proposed new source will have on the ambient air, and therefore on the allowable increment for a given region. EPA does not dispute the point as to the accuracy of existing techniques, but does argue that present diffusion modeling techniques, "while not corresponding to actual conditions in the ambient air, do provide a consistent and reproducible guide which can be used in comparing the relative impact of a source." 39 Fed. Reg. 31003 (August 27, 1974). So long as the method of measurement is consistent, it may be used as a reliable benchmark of the relative impact of different sources; EPA argues that it therefore is unnecessary to be able to guarantee with precision what effect a source will have.

We have no basis on which to question EPA's judgment as to its predictive techniques. Any consistent method of

[59] *See* pp. [14a-15a] *supra*.

[60] *See, e.g.*, br. of American Petroleum Institute *et al.* in No. 75-1665 at 38.

prediction can be adjusted in light of actual experience, and a state therefore may adjust its guidelines for future development on the basis of changes in the measured pollution levels over time. We cannot hold at this time, therefore, that lack of precision alone is a substantial objection to the methods which may be used to estimate the impact of a proposed source on actual levels of pollution.

J. Did EPA violate the Clean Air Act

(1) by not permitting submission of revised plans before promulgating regulations, or

(2) by not holding hearings in each state before promulgating the regulations?

The Administrator is required to prepare and publish his own implementation plan, or portion thereof, for a state if (a) the state fails to submit a plan as to any national standard, (b) the plan is not in accordance with the requirements of Section 110 of the Act, or (c) the state fails, within 60 days, to revise its plan pursuant to Section 110(a)(2)(H), which requires that implementation plans provide for revisions (i) to take account of changes in technology or (ii) if the Administrator determines that the plan is inadequate to achieve the primary or secondary standards. Section 110(c)(1), 42 U.S.C. § 1857c-5(c)(1) (Supp. IV 1974). Subsection (c)(1) also contains a hearing requirement; if a state did not hold a public hearing with respect to the plan or revision being promulgated, the Administrator must provide a hearing within the state. The Administrator is to promulgate his regulations within six months, unless within that time the state has adopted and submitted an implementation plan which is in accord with the requirements of Section 110. *Id.*

It is contended that the instant regulations, which amended the implementation plans of all states,[61] constituted a "revision" under Section 110(a)(2)(H). Under Section 110(c)(1)(C) the Administrator may promulgate new regulations only if a state fails, after 60 days, to submit the required (a)(2)(H) revision. Further, if the regulations are considered "revisions," it is claimed, the Administrator was required by Section 110(c)(1) to hold a hearing in each state before promulgating the regulations.

[61] *See* note 9 *supra*.

The original order of the District Court required that the "Administrator * * * prepare and publish proposed regulations, pursuant to 42 U.S.C. § 1857c-5(c), as to any state plan which he finds, on the basis of his review, either permits the significant deterioration of existing air quality in any portion of any state or fails to take the measures necessary to prevent such significant deterioration. Such regulations shall be promulgated within six months of this order." *Sierra Club v. Ruckelshaus,* Civil Action No. 1031-72 (D. D.C. May 30, 1972). That order—which was affirmed by this court and the Supreme Court—clearly did not contemplate that a hearing be held in each state prior to promulgation of regulations, nor did it require that the states be given a prior opportunity to revise their plans. We reaffirm the order in both respects.

All states had held public hearings on their proposed implementation plans before the District Court order was entered.[62] After disapproving all state plans insofar as they failed to prevent significant deterioration,[63] the Administrator held five regional hearings in Washington, Atlanta, Dallas, Denver, and San Francisco on proposed regulations,[64] and solicited written comments.[65] We believe that

[62] In its initial approval and disapproval of state plans, published May 31, 1972 (37 Fed. Reg. 10842), EPA noted that all states had held hearings and had submitted implementation plans.

[63] 37 Fed. Reg. 23836 (Nov. 9, 1972).

[64] *See* 39 Fed. Reg. 31000 (Aug. 27, 1974).

[65] *Id.*

procedure was sufficient in the circumstances presented. Unfortunately, the requirement of prevention of significant deterioration does not fit neatly into the statutory scheme, as it is not expressly included in Section 110 of the Act. The Administrator's disapproval of all plans pursuant to the District Court order, and the subsequent promulgation of regulations, were required by Section 101 of the Act and by the legislative history, but were not within the defined processes of Section 110(c). Implementation of the District Court order required an exercise of discretion by the Administrator, and we find that he acted well within that discretion by concluding that only regional hearings were necessary to supplement the hearings which had already been held in all states.

In making this decision we wish to emphasize, first, that petitioners have not alleged with any specificity how they were harmed by the lack of individual state hearings. We are presented only with a generalized statutory claim,[66] which apparently never was raised before the Agency. Second, it should be remembered that the states arguably have been denied no rights by promulgation of the nondeterioration regulations. They remain free, after public hearing, to develop their own regulatory scheme to supplant that promulgated by EPA, so long as the substitute

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[66] *Cf. American Airlines, Inc. v. CAB*, 123 U.S.App.D.C. 310, 318-319, 359 F.2d 624, 632-633, *cert. denied*, 385 U.S. 843 (1966):

> [T]here is no basis on the present record for concluding that additional procedures were requisite for fair hearing. We might view the case differently if we were not confronted solely with a broad conceptual demand for an adjudicatory-type proceeding, which is at least consistent with, though we do not say it is attributable to, a desire for protracted delay. Nowhere in the record is there any specific proffer by petitioners as to the subjects they believed required oral hearings, what kind of facts they proposed to adduce, and by what witnesses, etc. • • •

See also United States v. L. A. Trucker Lines, Inc., 344 U.S. 33 (1952).

prevents significant deterioration of air quality.[67] We cannot conclude, then, that the regulations are defective on procedural grounds.

K. By providing for reclassification of federal and Indian lands independent of state action, do the regulations abrogate authority granted to the states by the Clean Air Act?

Federal land managers and Indian governing bodies are authorized to propose redesignation of their lands, after consultation with officials of other affected areas and compliance with procedural and hearing requirements. 40 C.F.R. § 52.21(c)(3) (1975).[68] The industrial petitioners and the petitioning state governments object that this authority violates the delegation to the states of authority over air quality within their boundaries in Section 101(a)(3), 42 U.S.C. § 1857(a)(3),[69] and Section 107(a), 42 U.S.C. § 1857c-2(a),[70] that it contradicts the submission of federal facilities to state regulation in Section 118, 42 U.S.C.

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[67] *See* pp. [14a-15a] *supra.*

[68] *See* pp. [11a-12a] *supra.*

[69] 42 U.S.C. § 1857(a)(3) (1970):

> (a) The Congress finds—
>
> • • • •
>
> (3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments[.]

[70] 42 U.S.C. § 1857c-2(a) (1970):

> Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

§ 1857f,[71] and that the authority to redesignate gives these lands tremendous practical power over neighboring areas which might be hindered in their development because of designation of federal or Indian lands as Class I areas.[72]

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[71] 42 U.S.C. § 1857f (1970):

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so * * *.
> * * *

[72] *See* 39 Fed. Reg. 42512 (Dec. 5, 1974):

> Under the regulations promulgated below, a source could not be allowed to construct if it would violate an air quality increment either in the area where the source is to be located or in any neighboring area in the State. Therefore, wherever a Class I area adjoins a Class II or III area, the potential growth restrictions, especially for power plant development, extends [*sic*] well beyond the Class I boundaries into the adjacent area. A similar situation exists, to a greater or lesser degree, whereever areas of different classification adjoin each other. Therefore, the area with the less restrictive classification should include an additional area at the periphery where it is clearly recognized that development will be somewhat restricted due to the adjacent "cleaner" area. As a result, a Class I redesignation could be fairly limited in size, yet the adjoining Class II or Class III areas would need to cover a substantial area in order to fully utilize the Class II or III increment. Again, it should be clear that the Class II or III increment could only be fully utilized toward the center of the area and that at the periphery, allowable deterioration will be dictated by the adjoining Class I area rather than the Class II or III increment.

EPA has responded that federal land managers and Indian governing bodies have an important legal interest in protecting the air quality of their lands, that redesignation may not be proposed without consultation with officials of the affected states,[73] and that the Administrator may disapprove redesignation if arbitrary and capricious disregard of the interests of other affected areas is demonstrated.[74] With regard to submission of federal facilities to state regulation, EPA notes that federal lands may be redesignated only to a more restrictive classification than that applicable to the entire state,[75] and thus cannot contribute to unwanted deterioration of air quality.

We pretermit this question, as we find that the issue is not yet ripe for review.[76] No federal or Indian land has yet been redesignated, and to that extent we cannot be certain

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[73] 40 C.F.R. § 52.21(e)(3)(iv), (v) (1975).

[74] 40 C.F.R. § 52.21(e)(3)(vi)(*b*), (*c*) (1975).

[75] 40 C.F.R. § 52.21(e)(3)(iv) (1975).

[76] *See Toilet Goods Ass'n Inc. v. Gardner,* 387 U.S. 158 (1967), in which cosmetic manufacturers had brought a pre-enforcement action to challenge the authority of the Commissioner of Food and Drugs to issue regulations under the Color Additive Amendments to the Federal Food, Drug, as Cosmetic Act. The regulation at issue authorized the Commissioner to suspend certification service to any person who denied the FDA free access to manufacturing information. Although the issue was purely legal, the Court found that, as framed, it was not appropriate for judicial resolution:

> The regulation serves notice only that the Commissioner *may* under certain circumstances order inspection of certain facilities and data, and that further certification of additives *may* be refused to those who decline to permit a duly authorized inspection until they have complied in that regard. At this juncture we have no idea whether or when such an inspection will be ordered and what reasons the Commissioner will give to justify his order. The statutory authority asserted for the regulation is the power to promulgate regulations "for the efficient enforcement" of the Act, § 701(a). Whether the regulation is justified thus depends not only, as petitioners appear to suggest, on whether Congress refused to include a specific sec-

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how a conflict may evolve. If the Administrator were to approve, as replacements for these regulations, individual state plans which did not include the powers granted to federal land managers and Indian governing bodies, the problems foreseen by petitioners might never arise.

We note that reservation of power to federal land managers and Indian governing bodies should have no effect on present conduct; there appears to be no reason why economic development of any area should be hindered by the possibility that a nearby area may be redesignated in the future to a more restrictive classification. We therefore do not foresee any irreparable injury which may arise from deferral of this question until it arises in a more concrete context.

L. Are the regulations constitutional?

We find the arguments challenging the constitutionality of the nondeterioration regulations to be insubstantial. Regulation of air pollution clearly is within the power of the federal government under the commerce clause,[77] and

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tion of the Act authorizing such inspections, although this factor is sure to be a highly relevant one, but also on whether the statutory scheme as a whole justified promulgation of the regulation. * * * This will depend not merely on an inquiry into statutory purpose, but concurrently on an understanding of what types of enforcement problems are encountered by the FDA, the need for various sorts of supervision in order to effectuate the goals of the Act, and the safeguards devised to protect legitimate trade secrets * * *. We believe that judicial appraisal of these factors is likely to stand on a much surer footing in the context of a specific application of this regulation than could be the case in the framework of the generalized challenge made here.

387 U.S. at 163-164 (emphasis in original).

[77] *See District of Columbia v. Train*, 172 U.S.App.D.C. 311, 328, 521 F.2d 971, 988 (1975); *Pennsylvania v. EPA*, 500 F.2d 246, 259 (3d Cir. 1974); *South Terminal Corp. v. EPA*, 504 F.2d 646, 677 (1st Cir. 1974).

we can see no basis on which to distinguish deterioration of air cleaner than national standards from pollution in other contexts.[78] Nor do we agree that the regulations bear no rational relationship to protection of public health and welfare and therefore violate the due process clause of the Fifth Amendment. There is a rational relationship between air quality deterioration and the public health and welfare,[79] and there is a proper legislative purpose [80] in prevention of significant deterioration of air quality. Neither can the regulations be construed as an unconstitutional "taking" under the Fifth Amendment, any more than existing emission control regulations represent such a "taking."[81] The use of private land certainly is limited, but the

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[78] Indeed, the vigorous objections that have been mounted against redesignation of federal lands or Indian lands are based on recognition that a pollution source can have air quality effects over a large area.

[79] *See* note 58 *supra*.

[80] *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258-259 (1964), in which the Court held the Civil Rights Act of 1964 to be a valid exercise of congressional power under the commerce clause, and found the Act not barred by the Fifth Amendment:

> Nor does the Act deprive appellant of liberty or property under the Fifth Amendment. The commerce power invoked here by the Congress is a specific and plenary one authorized by the Constitution itself. The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate. * * *

See also Nebbia v. New York, 291 U.S. 502, 537 (1934) (Fourteenth Amendment).

[81] *See South Terminal Corp. v. EPA*, 504 F.2d 646, 678 (1st Cir. 1974), in which the court upheld a transportation control plan which mandated a 40% reduction in available off-street parking spaces:

> [T]he Government has not taken title to the spaces, and the decision about alternative uses of the space has been left to the

[continued]

limitation is not so extreme as to represent an appropriation of the land.

The Tenth Amendment is not implicated either by infringement on the reserved powers of the states, *cf. National League of Cities v. Usery,* —— U.S. ——, 44 U.S. L. WEEK 4974 (June 24, 1976), or by any requirement of affirmative action, as in *District of Columbia v. Train,* 172 U.S.App.D.C. 311, 521 F.2d 971 (1975). The states retain broad discretion under the regulations to control the use of their land and the scope of their economic development, and are required to take no affirmative action. Preconstruction review under the regulations is conducted by the Administrator unless a state requests that responsibility be delegated to it. 40 C.F.R. § 52.21(d), (f) (1975).

Last, we find no merit to the argument that the congressional delegation of authority to EPA is unconstitutionally vague. There is substantial basis for the instant regulations in both the Clean Air Act and its legislative history, and we find the regulations to be a reasonable means of implementing the congressional intent.[82] *See South Terminal Corp. v. EPA,* 504 F.2d 646, 676-677 (1st Cir. 1974).

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owner. The takings clause is ordinarily not offended by regulation of uses, even though the regulation may severely or even drastically affect the value of the land or real property. If the highest-valued use of the property is forbidden by regulations of general applicability, no taking has occurred so long as other lower-valued, reasonable uses are left to the property's owner. • • •

[82] In *Lichter v. United States,* 334 U.S. 742, 785 (1947), the Court upheld a congressional grant of authority to the Secretary of War, the Secretary of the Navy, and the Chairman of the Maritime Commission to renegotiate contracts and to recover "excessive profits." The Court applied the following reasoning to the claim that the term "excessive profits" was unconstitutionally vague:

> It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program. "If Congress shall lay down by legislative act an intelligible principle . . . such legislative action is not a forbidden delegation of legislative power." *Hampton Co.* v. *United States,* 276 U.S. 394, 409. Standards prescribed by Congress are to be read in the light of the conditions to which they are to be applied. "They derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear." *American Power & Light Co.* v. *S.E.C.,* 329 U.S. 90, 104. • • •

VI. CONCLUSION

We find no ground on which to disturb the regulations under review, and we therefore affirm the EPA "Prevention of Significant Air Quality Deterioration" regulations.[83] Our review of *Sierra Club v. Ruckelshaus* and subsequent events has revealed no substantial reason for rejection of that decision, and we hold that the nondeterioration regulations promulgated pursuant to that decision are both rational and in accordance with law.

Affirmed.

Circuit Judge WILKEY concurs in the result only.

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[83] As noted above, *see* pp. [45a-48a], we do not decide the question whether reclassification of federal and Indian lands independent of state action may be unlawful.

APPENDIX B

39 Fed. Reg. 42509 *et seq.* (December 5, 1974) included the explanatory preamble set forth below (pp. 53a-75a *infra*) and the text of the "significant deterioration" regulations (40 C.F.R. §§ 50.01(d), (f), and 52.21). The text of the "significant deterioration" regulations within 39 Fed. Reg. 42509, *as amended,* 40 Fed. Reg. 2802 (January 16, 1975), 40 Fed. Reg. 25004 (June 12, 1975), and 40 Fed. 42011 (September 10, 1975) is set out at 75a-90a *infra.*

Title 40—Protection of Environment

CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY

SUBCHAPTER C—AIR PROGRAMS

[FRL 302-4]

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

Prevention of Significant Air Quality Deterioration

On May 31, 1972 (37 FR 10842), the Administrator of the Environmental Protection Agency published initial approvals and disapprovals of State Implementation Plans submitted pursuant to section 110 of the Clean Air Act, as amended in 1970.

On November 9, 1972 (37 FR 23836), all State Implementation Plans were disapproved insofar as they failed to provide for the prevention of significant deterioration of existing air quality. This action was taken in response to a preliminary injunction issued by the District Court for the District of Columbia, which also required the administrator to promulgate regulations as to any state plan which either permits

the significant deterioration of air quality in any portion of any state, or fails to take the measures neces sary to prevent such significant deterioration.

Accordingly, on July 16, 1973 (38 FR 18986), an initial notice of proposed rulemaking was published which set forth four alternative plans for preventing significant deterioration, and which solicited widespread public involvement in all aspects of the significant deterioration issue. A series of public hearings were held and over 300 written comments were submitted in response to this proposal. The hearing records and the written comments are available for inspection at the EPA Freedom of Information Office, 401 M Street, SW., Washington, D.C.

Due to the lack of precise direction either in the Clean Air Act or in the Court order, the initial proposals focused on the conceptual basis for regulations. The comments received on the proposed regulations therefore tended primarily to discuss conceptual issues such as the roles of federal and state/local governments, rather than detailed comments regarding implementation of the regulations. Accordingly, on August 27, 1974 (39 FR 31000), the Administrator issued reproposed regulations in order to properly explore all aspects of this issue and to focus more clearly on procedural and technical issues.

The Administration has submitted for consideration an amendment to the Act which would eliminate the requirement for preventing significant deterioration of air quality. This amendment is pending before the Congress. Although EPA does not endorse this amendment, EPA seeks full public debate on the significant deterioration issue and in issuing these regulations does not intend to delay or influence consideration of this amendment. The regulations issued herein are necessary because the Court has ruled that the current

Clean Air Act requires the Administrator to prevent significant deterioration, and this requirement must be met even though it is possible that Congress may provide additional guidance and/or legislative changes in the future.

The regulations proposed on August 27, 1974, called for the establishment of "classes" of different allowable incremental increases in total suspended particulates (TSP) and sulfur dioxide (SO_2). Class I applied to areas in which practically any change in air quality would be considered significant; Class II applied to areas in which deterioration normally accompanying moderate well-controlled growth would be considered insignificant; and Class III applied to those areas in which deterioration up to the national standards would be considered insignificant. Under the proposed regulation, all areas of the country would be designated Class II initially, with provisions for allowing States to reclassify any area to accommodate the social, economic, and environmental needs and desires of the public.

The plan would be implemented through a preconstruction review of specified source categories to determine whether these sources would cause a violation of the appropriate increments. The new source review also included a provision requiring the use of best available control technology on sources covered by the regulation. Finally, the proposal provided procedures for public comment on each application for permission to construct and for delegating the responsibility for implementing the new source review procedures to States or local governmental units.

Discussion of Public Comments

The August 27 proposal was criticized by environmental groups as being unresponsive to the District

Court's order in that it permits the deterioration of air quality up to the national standards in Class III regions. Although this result could also occur in Class I or Class II regions where the difference between existing air quality and the national standard is less than the prescribed air quality increment, all such comments focused on the provision for Class III areas. Unless "significant deterioration" is defined as a percentage of the "unused" air resource, any air quality increment plan, regardless of how small the increment is, could allow deterioration up to the national standard in some instances. As discussed in the preamble to the proposals of July 16, 1973, and August 27, 1974, air quality monitoring is presently concentrated in heavily polluted areas, with only scattered monitoring in relatively clean areas. Vast numbers of additional monitors will be necessary to precisely define existing air quality, making a plan that is dependent on a knowledge of existing air quality virtually unworkable. Therefore, the fact that air quality could, in some instances, increase to the national standard, does not, in the Administrator's opinion, make the August 27 proposal inconsistent with the Court's ruling.

Additional comments involving Class III areas indicated that economic and social factors should have no bearing on the definition of significant deterioration. These comments stated that EPA must consider only air quality factors and that a single nationwide definition of significant deterioration must be established. Such comments did not take issue with Agency statements made on July 16, 1973, and August 27, 1974 that the definition of significant deterioration is basically a subjective decision. None of the comments suggesting changes to the increments proposed by the Administrator, or proposing alternate plans, offered any justification for the numbers which were selected. Since the consideration of "air quality factors" alone

essentially leads to an arbitrary definition of what is "significant," this term only has meaning when the economic and social implications are analyzed and considered. Therefore, the Administrator believes that it is most important to recognize and consider these implications, since the consideration of air quality factors alone provides no basis for selecting one deterioration increment over another.

Even in the subjective terms that are required when considering only the environmental aspects, the contention that there must be a single definition of significant deterioration applicable nationwide does not appear to address the wide range of environmental needs which exist. Most of the comments implicitly recognized that there is a need to develop resources in presently clean areas of the country, and that significant deterioration regulations should not preclude all growth, but should ensure that growth occurs in an environmentally acceptable manner. However, there are some areas, such as national parks, where any deterioration would probably be viewed as significant. A single nationwide deterioration increment would not be able to accommodate these two situations.

Along these lines, comments were specifically requested in the proposal as to whether the Class II increment should be doubled. Power companies generally supported such a change, while other comments from the industrial sector indicated that the increments were adequate for well-controlled growth. Power companies indicated that many new plants would be much larger than those which would be allowed in a Class II area (approximately 1000 megawatts), and that the Class II increment ought to accommodate such development. None of the comments presented any reasons for permitting such development in a Class II rather than a Class III area, except that the initial

designation of all areas will be Class II. The Administrator continues to feel that a Class II increment should be compatible with moderate, well-controlled development in a nationwide context, and that large-scale development should be permitted only in conjunction with a conscious decision to redesignate the area as Class III.

Many comments also criticized the omission of carbon monoxide (CO), nitrogen oxides (NOx), hydrocarbons (HC), and photochemical oxidants (Ox) from the regulations. As indicated on July 16, 1973, and August 27, 1974, and in previous actions involving indirect source review (38 FR 29893 at 29894, 39 FR 7270 at 7272, and 39 FR 25292 at 25295), existing analytical procedures are not adequate to determine the impact of individual sources on air quality concentrations of reactive pollutants (NOx and HC/Ox). The only presently available technique for relating emissions to air quality for these pollutants is the area-wide proportional model used for demonstrating the adequacy of control strategies. The proportional model requires that measured air quality data be available; however, as indicated above, such data are very limited in presently clean areas (even more so than for TSP and SO_2). In contrast, the air quality concentration of stable pollutants can reasonably be estimated using a diffusion model and therefore measured air quality data are not necessary to determine the incremental air quality impact of an individual source. In addition, since the proportional model assumes that air quality is proportional to emissions, the key to analyzing the impact of an individual source focuses on the definition of baseline emissions. If the source would be located in a very clean area with virtually no baseline emissions, then the predicted air quality increase would be very large (when in fact it probably would not). If the source would be located in a large metro-

politan area and the baseline emissions are those of the entire metropolitan area, then the predicted impact of a single additional source would be very small. Therefore, the proportional model is adequate for control strategy development in urban areas where measured air quality data are available and the aggregate impact of controlling many sources is being analyzed. However, it is inappropriate for analyzing the incremental impact of individual new sources.

At this time, the only practical approach for dealing with these pollutants appears to be to minimize emissions as much as possible. The Federal Motor Vehicle Control Program accomplishes this for individual motor vehicles. New source performance standards (NSPS) have already been established under Part 60 of this chapter for many of the source categories subject to the regulation. Where practicable, emission limitations for CO, NOx, and HC have been promulgated for those sources presently subject to Part 60. Although some of the source categories are not yet included in Part 60, either (1) those that are not covered are not significant emitters of CO, NOx, or HC, or (2) control technology for these pollutants is unavailable or an emission limitation is impractical (e.g. HC emissions from coke ovens).

One additional step which could be taken to minimize emission of CO, NOx, and HC appears to be in the area of minimizing vehicle miles of travel (VMT). Plans for reducing VMT and minimizing future VMT growth have been developed as part of the Transportation Control Plans (TCP) promulgated elsewhere in this chapter. Since the TCP's focus on major metropolitan areas, the flexibility available in designing these plans would be more limited when applied to rural and outlying areas. It is clear, however, that comprehensive transportation planning offers an appropriate mechanism for minimizing VMT growth in

such areas. It is not clear, however, how EPA might become involved in comprehensive transportation planning throughout the country under these regulations, although States may wish to consider such an approach when developing their own plans to prevent significant deterioration. States of course, are not precluded from including other more comprehensive measures for dealing with HC, CO, and NOx in their own plans.

Some difficult additional questions arise as to how this concept of VMT minimization could be incorporated into these significant deterioration regulations. Would the addition of a VMT increment, similar to the air quality increment approach used in these regulations, be appropriate? Would a new source review of specific indirect sources be practical, or should the review apply to larger scale projects such as a new town or a large new development? The Administrator solicits additional comments on this issue and may modify the regulation at a later date if workable procedures in this area can be developed.

The August 27 proposal specified that all areas of the country, including those areas above the national standards, would be subject to the significant deterioration regulations, even though the District Court order only required the prevention of significant deterioration in areas presently below the national standards. This was done because it was not possible to specify in these regulations all areas of the country which exceed the national ambient air quality standards. In addition, there would be no practical impact of these significant deterioration regulations in areas above the standards, since emissions in such areas are being reduced under the state implementation plans, while these regulations provide for limited allowable increases in emissions.

Nonetheless, there were a number of comments requesting that these regulations specifically exempt all areas presently above the national standards. The regulations promulgated below provide for this exemption only with respect to the area classification requirements. The preconstruction review is still applicable in all areas of the country, in order to ensure that new sources be examined for their impact in presently clean areas which may be adjacent to areas that are above the national standards. In addition, the requirements for applying best available control technology are also applicable to all sources subject to review in order to minimize the deterioration caused by individual sources. This requirement is particularly important where a source in one State would use up a significant portion of the air quality increment in a neighboring State.

The exemption of areas from the classification requirements will be done on a county basis (or functionally equivalent area) and will be based on a determination by the State that the air quality in the county is pervasively above the national standard. No attempt has been made to define these counties in these regulations. Instead, States must notify the Administrator by June 1, 1975, of those areas which are exempt from the classification requirements.

There were a number of comments requesting clarification of the relationship of these regulations to other portions of the existing implementation plans, particularly the air quality maintenance plans (AQMP's) to be submitted by June, 1975. An air quality maintenance plans (AQHP's) to be submitted by June, 1975. An air quality maintenance area (AQMA) is an area designated by the Administrator that may have the potential for exceeding any national standard within the next 10-year period as a consequence of current

air quality and/or the projected growth rate of the area. The States are required to submit an analysis of the impact on air quality of projected growth in each designated potential problem area. Where maintenance problems are identified by this analysis, the states must also submit plans containing measures to ensure maintenance of national standards during the ensuing 10-year period. AQMA's have been proposed for specific pollutants and final designations will be published shortly. Where an AQMA has been designated because of projected problems in maintaining the NAAQS for either TSP or SO_2 the significant deterioration increment is applicable only to those portions of the AQMA which are cleaner than either standard. By design AQMA boundaries have been designated to include substantial areas which are relatively clean. This has been done to insure that the planning area corresponds to the entire area where projected new growth in emissions is likely to occur and where regional planning for public services, housing and employment is focused.

Although there seemed to be a general assumption that AQMA's should be designated as Class III, there are several situations where a State may wish to leave the clean air portions of an AQMA as Class II or even to redesignate the area to a Class I. This would limit peripheral growth so as to complement the goals of the AQMP and in this context, the significant deterioration would actually be a mechanism for partially implementing the AQMP. In addition, there are several clean air areas which have been proposed as AQMA's due to anticipated large-scale development of natural resources. A Class I or Class II designation for such areas would probably eliminate the need for an AQMP for TSP or SO_2, since the air quality constraint would be the Class I or Class II increment. Therefore, a "designation" of the AQMA for TSP

or SO_2 may be appropriate. In any case, the Administrator recommends that any proposed significant deterioration redesignation have boundaries consistent with AQMA boundaries to facilitate the development of the AQMA plan.

A Class III designation does not necessarily mean that an AQMP would be required. For example, a clean air area might be designated Class III on the basis of a marginal anticipated deterioration in air quality which exceeds the Class II increments. However, the anticipated resulting air quality would still be well below the national standards. If little additional development were anticipated over the subsequent 10-year period so as to threaten the national standards, no AQMP would be required.

Furthermore, it is important to recognize that area classifications do not necessarily imply current air quality or current land use patterns. Instead, classifications should reflect the desired degree of change from current levels and patterns.

A number of public comments indicated concern that these regulations would create a duplication of new source review procedures, which would require a source owner to apply to several different governmental agencies before he could commence construction.

Where the State assumes responsibility for carrying out the new source review procedure under these regulations, most of the concerns expressed above should be eliminated. Procedurally and administratively, the significant deterioration review is virtually identical to existing new source review procedures included in the implementation plan and, in fact, application could probably be made on the same forms. No additional sources would be covered by the significant deteriora-

tion review. The only difference between the two new source reviews is in the tests which must be met before approval will be granted. Instead of meeting only the emission limitations which are part of the applicable plan, sources covered by the significant deterioration review must also meet an emission limitation which is consistent with the application of best available control technology. The most restrictive emission limitation supersedes all others. In addition to not causing a violation of any national standard, sources covered by the significant deterioration review must not cause an applicable air quality increment to be exceeded. Technically, the calculations needed to determine if these additional tests will be met are very similar to those already being done. Therefore, where a State administers these regulations, integration with the existing plan should be relatively easy, resulting in only minor additional resource demands. If States do not assume responsibility for implementing these regulations, EPA, through its Regional Offices, will carry out the new source review as required by the Act. Since this may cause duplication of effort on the part of EPA and the States, as well as additional requirements for source owners, the Administrator strongly urges States to accept delegation of these regulations or to develop their own regulations pursuant to the guidance to be issued shortly pursuant to Part 51 of this chapter.

In response to public comments, the Administrator is considering the addition of other source categories, such as asphalt concrete plants and ferro-alloy plants, to these regulations. One possibility is to add those sources for which new source performance standards for particulate matter and sulfur dioxide have been proposed or promulgated under Part 60 of this chapter. A proposal to add other source categories will be issued shortly.

One comment indicated confusion as to what functions the Administrator intended to delegate to States under these regulations. The confusion apparently related to the definition of "Administrator" under paragraph (b)(3) as including the Administrator's "designated representative." Although the term "Administrator" is used in paragraph (c), relating to the approval of State redesignation, the Administrator does not intend to designate to a representative outside the Agency the review and approval functions under this paragraph. As indicated in paragraph (f), the only functions which will be delegated to States will be the preconstruction review under paragraphs (d) and (e).

A question was raised as to whether an area could have one classification for SO_2 and another for TSP. Different classifications for SO_2 and TSP may make sense in certain situations, and the Administrator does not intend to preclude this option.

Several public comments requested that the technical procedures for determining the air quality impact of a new source be specified by EPA. The techniques the Agency intends to use in most cases are set forth in "Guidelines for Air Quality Maintenance Planning and Analysis," Vols. 10 and 12. Volume 10, "Reviewing New Stationary Sources," pertains to the air quality impact of individual sources, while Vol. 12, "Applying Atmospheric Simulation Models to Air Quality Maintenance Areas," will be used to determine the impact of other growth and development in the area affected by the source. These documents are available for inspection at EPA's Regional Offices and the EPA Freedom of Information Center, 401 M Street, SW., Washington, D.C. 20460, and will be available shortly for general distribution through the National Technical Information Service, 5258 Port Royal Road, Springfield, Virginia 22151. The Administrator, or

States which will be implementing the preconstruction review as EPA's agent, is not required to use the techniques in these documents if other techniques are more appropriate in certain circumstances.

There was considerable divergence of opinion over the initial classification of all areas. Industrial groups generally supported an initial designation of Class III so as to minimize disruption of projects scheduled to commence construction in the near future. Environmental groups supported an initial designation of Class I, fearing that a Class II or III designation would permit air quality deterioration of some clean areas before States could act to redesignate areas to a more restrictive classification. The Administrator continues to feel that an initial Class II designation represents the most reasonable compromise between these widely differing positions. Also, since the regulations apply only to sources which commence construction after June 1, 1975, the Administrator feels that this deferral should reduce disruption to the industrial sector while permitting States sufficient time to consider reclassifying any area either to Class I or III before requests for approval must be acted upon.

There were several questions raised concerning the appropriate size of an area which should be considered for redesignation. Calculations have shown that because of the small air quality increments specified for Class I areas, these levels can be violated by a source located many miles inside an adjacent Class II or III area. For example, a power plant which just meets the Class II increment for SO_2 could under some conditions violate the Class I increment for SO_2 60 or more miles away. Under the regulations promulgated below, a source could not be allowed to construct if it would violate an air quality increment either in the area where the source is to be located or in any neighboring

area in the State. Therefore, wherever a Class I area adjoins a Class II or III area, the potential growth restrictions, especially for power plant development, extends well beyond the Class I boundaries into the adjacent areas. A similar situation exists, to a greater or lesser degree, wherever areas of different classification adjoin each other. Therefore, the area with the less restrictive classification should include an additional area at the periphery where it is clearly recognized that development will be somewhat restricted due to the adjacent "cleaner" area. As a result, a Class I redesignation could be fairly limited in size, yet the adjoining Class II or Class III areas would need to cover a substantial area in order to fully utilize the Class II or III increment. Again, it should be clear that the Class II or III increment could only be fully utilized toward the center of the area and that at the periphery, allowable deterioration will be dictated by the adjoining Class I area rather than the Class II or III increment.

The distance a large source would need to be located away from a Class I boundary is more dependent on the meteorological conditions in the area rather than the size of the source. Where very long pollutant travel times from the source to the receptor are involved, the assumptions concerning the persistence of wind direction and atmospheric stability are critical. At some point, it can be assumed that a receptor will be virtually unaffected by a source, regardless of the source strength, since the critical meteorological conditions would not be expected to persist long enough to move the pollutants from source to receptor for any significant period of time. This distance is, of course, dependent on local meteorological conditions, but for most areas the maximum distance would be 60 to 100 miles.

Changes to the Regulations

1. *Definition of Modified Source.* The term "expanded source" was used in the proposal in place of the more commonly used term "modified source" in order to specifically exclude from the preconstruction review sources which increase emissions solely due to switching from a low sulfur to a higher sulfur content fuel. The proposed definition of expanded source was related to whether a source increased emissions through a "major capital expenditure." This phrase was criticized by many as being too vague. Therefore, the general term "modified source" has been reinstated, along with a specific exemption for fuel conversion, which exemption is applicable only to the significant deterioration review procedures. The general definition of modified source in Part 52 is changed slightly to be more specific and to be consistent with the definition used in Part 60. Changes to the definition of modification in Part 60 were proposed on October 15, 1974 (39 FR 36946) and comments on this proposal are presently being analyzed. It is the Administrator's intent to change the definition of modification under Part 52 to be consistent with the final definition of this term under Part 60.

These changes are not intended to modify the applicability of either the proposed significant deterioration regulations or other new source review procedures promulgated elsewhere in Part 52.

2. *Definition of best available control technology.* Since this term may be used elsewhere in Part 52 in the future, it has been defined in the general definitions section of Part 52. The definition is consistent with the wording used in the August 27 proposal. It should be noted that new source performance standards (NSPS) may only apply to certain affected facilities within a large source. For example, only basic oxygen

process furnaces in a steel mill are presently covered by NSPS, while blast furnaces, scarfing operations and other significant sources within the mill are not presently covered. BACT must be determined for these facilities on a case-by-case basis until such time as NSPS are issued for these other facilities.

3. *Definition of baseline air quality concentration.* The proposal intended to establish the baseline air quality as that air quality existing as of the effective date of regulation, adjusted to include air resource commitments resulting from approval of other air pollution sources pursuant to existing new source review procedures in the plan. The definition of baseline air quality has been clarified to reflect this intent and the calculation has been simplified by specifying the use of 1974 air quality data rather than 1973 data. No substantive change is intended by this revision.

4. *Conditions for applying for redesignation of areas.* In order that the Administrator have an adequate basis for determining whether an application to redesignate an area should be approved or disapproved, a provision has been added to paragraph (e)(3)(ii) to require that the necessary information be a part of the hearing record on the proposed designation. Specifically, the hearing record must show that the social, environmental, and economic effects of the proposed redesignation have been evaluated for the area being reclassified as well as for adjacent areas and that regional and national interests have been considered. The Administrator will provide additional guidance to assist States in developing their redesignation proposals and analyzing the impact of such redesignations.

5. *State reclassification of Federal and Indian Lands.* Various public comments indicate that Federal lands should be subject to State jurisdiction. EPA did not intend to preclude State redesignations provided

that the Federal Land Manager can elect to keep the air quality over Federal lands in a more pristine condition than the State might designate. Therefore, the regulations have been revised to subject Federal lands to State redesignations but reserve to the Federal Land Manager the authority to subject such lands to a more stringent designation. This approach is consistent with section 118 of the Clean Air Act (42 U.S.C. 1857f) which requires that Federal agencies having jurisdiction over any property or facility meet substantive State air pollution control standards and limitations. There is nothing in the Clean Air Act or the legislative history of that Act that indicates the Congress intended to preclude the Federal Government from meeting more restrictive standards than are imposed by the States. This provision also ensures that national forests and parks can be protected by the Federal Government from deterioration of air quality. The different treatment accorded lands of exclusive Federal jurisdiction has been eliminated since the revised regulations make it clear that the Federal Government can protect air quality over all Federal lands. In accordance with Executive Order 11752, these regulations do not require Federal facilities to comply with State or local administrative procedures with respect to pollution abatement and control. Review of new sources on Federal lands is reserved to EPA, except as State review is permitted by a Federal Land Manager with respect to activities conducted under Federal leases.

The State of New Mexico commented that the proposed regulations appeared to take authority away from the States to regulate air pollution over Indian lands. These regulations were not intended to alter the present legal relationships between the States and Indian Reservations within the States. As these relationships vary from State to State, EPA has not attempted to define such relationships but has modified the proposed regulations to clarify that there is no intent to alter these relationships. Where States have not assumed jurisdiction over Indian lands, the regulations provide that the Indian governing body may propose redesignations to the Administrator. Boundary problems between Indian and State lands are dealt with in the same way that boundary problems between two States are dealt with, as discussed below. This is consistent with the independent status of Indian lands not subject to State laws.

6. *Public comment on proposed redesignations.* In order to permit the public an opportunity to comment on whether a proposed redesignation should be approved or disapproved, the Administrator will publish all proposed redesignations in the FEDERAL REGISTER as proposed rulemaking and provide at least 30 days for submission of public comments.

7. *Preconstruction review and BACT in Class III areas.* Several public comments criticized the proposed regulations for exempting sources in Class III areas from preconstruction review. It was pointed out that there would be no procedure to prevent construction of a source in a Class III area which would violate an increment in an adjacent Class I or II area. Therefore, the regulations promulgated below require that new sources, wherever they are located, must be reviewed to determine the impact on air quality in adjacent regions.

In order to minimize the deterioration caused by individual sources, the proposal has been modified to make the BACT requirements applicable wherever the source is located, not just in Class I or II areas. Since a source located many miles away from a Class I area could easily use up the entire Class I increment, as discussed below, the necessity to minimize emis-

sions as much as possible in all areas is particularly important.

8. *Determination of allowable air quality increment.* The provisions of paragraph (d)(2)(i) have been modified to be more specific and to specify that reduction of emissions from existing sources which contributed to the baseline air quality concentration should be accounted for in determining the unused portion of the allowed air quality increment.

9. *EPA review of state redesignations.* The proposed regulations did not adequately cover problems created when a State or Indian Governing Body wishes to designate one or more of its areas in such a way that it will have a negative impact on other States or Indian Reservations. These regulations provide that a State or Indian Governing Body must take into account the effect of proposed redesignations on other States, Indian Reservations, and regional and national interests. Where no State or Indian Governing Body protests the redesignation of another State or Indian Reservation, the Administrator will only review the redesignation to determine whether it is arbitrary and capricious. However, where a State or Indian Governing Body protests a redesignation to the State proposing the redesignation and to the Administrator, the Administrator will take an expanded role of review in which he will balance the competing interests involved.

10. *Specification of emission limitation.* In order to ensure that the requirement for applying BACT is properly implemented, the provisions of paragraph (d)(2)(ii) have been modified to require that an emission limitation be established as a condition to approval. This places the emphasis on emissions rather than the presence of any particular control equipment. This change also makes the BACT requirement for

sources not covered by NSPS more consistent with the NSPS requirements. However, if the Administrator determines that technological or economic limitations on the application of measurement methodology to a particular class of sources would make the imposition of an emission standard infeasible, he may instead prescribe a design or equipment standard requiring the application of best available control technology. Such standard shall to the degree possible set forth the emission reductions achievable by implementation of such design or equipment, and shall provide for compliance by means which achieve equivalent results.

11. *Responsibility for performing air quality impact analysis.* A number of public comments suggested that the reviewing agency analyze the air quality impact of additional growth that has occurred in the vicinity of the proposed source since the reviewing agency is more likely to have the necessary data which is needed. The Administrator has concluded that it would be more appropriate for the reviewing agency to perform the air quality impact analysis based on information submitted by the applicant. This change will eliminate the uncertainty which was expressed concerning the requirement that the applicant analyze the air quality impact of general growth and development "in the area affected by the proposed source," since the reviewing agency will define this area and perform the calculations required. Also the provisions of paragraph (d)(3) do not require the applicant to submit growth data with each application. However, the reviewing agency may request such data from the applicant in cases where it does not have the necessary information and will specify the area over which such information is required.

12. *Procedures for public participation.* The procedures specified in paragraph (e) for public comment

on an application to construct have been modified to be consistent with the procedures contained in EPA's regulations for indirect source review (39 FR 25292). The changes allow the reviewing agency to require additional information, where necessary, and permit the applicant to respond to public comments involving his application to construct.

13. *Sources subject to review.* As proposed on August 27, several of the 19 source categories subject to the preconstruction review appeared to be restricted to an individual process (e.g. Kraft pulp mill recovery furnaces) rather than all emission points on the premises. The wording has been changed to be consistent with the listing of the other source categories and to make clear that all emission points associated with a stationary source must be considered in determining whether the source will violate an applicable air quality increment. This change allows sintering plants to be dropped from the list, since sintering operations will be covered under the primary metals industries which are subject to review under these regulations.

A detailed explanation of the technical and policy considerations which form the basis for these regulations is being prepared. Upon completion, the Administrator will publish a notice in the FEDERAL REGISTER announcing the availability of this information for public inspection.

These regulations will be effective January 6, 1975 and will be applicable to sources commencing construction on or after June 1, 1975.

(Secs. 110(c) and 301(a) of the Clean Air Act as amended [42 U.S.C. 1857 c-5(c) and 1857 g(a)])

Dated: November 27, 1974.

RUSSELL E. TRAIN,
Administrator.

Subpart A, Part 52, Chapter I, Title 40, Code of Federal Regulations, is amended as follows:

1. In § 52.01, paragraph (d) is revised and paragraph (f) is added. As amended § 52.01 reads as follows:

§ 52.01 Definitions.

* * * * *

(d) The phrases "modification" or "modified source" mean any physical change in, or change in the method of operation of, a stationary source which increases the emission rate of any pollutant for which a national standard has been promulgated under Part 50 of this chapter or which results in the emission of any such pollutant not previously emitted, except that:

(1) Routine maintenance, repair, and replacement shall not be considered a physical change, and

(2) The following shall not be considered a change in the method of operation:

(i) An increase in the production rate, if such increase does not exceed the operating design capacity of the source;

(ii) An increase in the hours of operation;

(iii) Use of an alternative fuel or raw material, if prior to the effective date of a paragraph in this Part which imposes conditions on or limits modifications, the source is designed to accommodate such alternative use.

* * * * *

(f) The term "best available control technology," as applied to any affected facility subject to Part 60 of this chapter, means any emission control device or technique which is capable of limiting emissions to the levels proposed or promulgated pursuant to Part 60

of this chapter. Where no standard of performance has been proposed or promulgated for a source or portion thereof under Part 60, best available control technology shall be determined on a case-by-case basis considering the following:

(1) The process, fuels, and raw material available and to be employed in the facility involved,

(2) The engineering aspects of the application of various types of control techniques which have been adequately demonstrated,

(3) Process and fuel changes,

(4) The respective costs of the application of all such control techniques, process changes, alternative fuels, etc.,

(5) Any applicable State and local emission limitations, and

(6) Locational and siting considerations.

* * * * *

§ 52.21 Significant deterioration of air quality.

(a) *Plan disapproval.* Subsequent to May 31, 1972, the Administrator reviewed State implementation plans to determine whether or not the plans permit or prevent significant deterioration of air quality in any portion of any State where the existing air quality is better than one or more of the secondary standards. The review indicates that State plans generally do not contain regulations or procedures specifically addressed to this problem. Specific disapprovals are listed, where applicable, in Subparts B through DDD of this part. No disapproval with respect to a State's failure to prevent significant deterioration of air quality shall invalidate or otherwise affect the obligations

of States, emission sources, or other persons with respect to all portion of plans approved or promulgated under this part.

(b) *Definitions.* For the purposes of this section:

(1) "Facility" means an identifiable piece of process equipment. A stationary source is composed of one or more pollutant-emitting facilities.

(2) The phrase "Administrator" means the Administrator of the Environmental Protection Agency or his designated representative.

(3) The phrase "Federal Land Manager" means the head, or his designated representative, of any Department or Agency of the Federal Government which administers federally-owned land, including public domain lands.

(4) The phrase "Indian Reservation" means any federally-recognized reservation established by Treaty, Agreement, Executive Order, or Act of Congress.

(5) The phrase "Indian Governing Body" means the governing body of any tribe, band, or group of Indians subject to the jurisdiction of the United States and recognized by the United States as possessing power of self-government.

(6) "Construction" means fabrication, erection or installation of a stationary source.

(7) "Commenced" means that an owner or operator has undertaken a continuous program of construction or modification or that an owner or operator has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification.

(c) *Area designation and deterioration increment.* (1) The provisions of this paragraph have been incor-

porated by reference into the applicable implementation plans for various States, as provided in Subparts B through DDD of this part. Where this paragraph is so incorporated, the provisions shall also be applicable to all lands owned by the Federal Government and Indian Reservations located in such State. The provisions of this paragraph do not apply in those counties or other functionally equivalent areas that pervasively exceeded any national ambient air quality standards during 1974 for sulfur dioxide or particulate matter and then only with respect to such pollutants. States may notify the Administrator at any time of those areas which exceeded the national standards during 1974 and therefore are exempt from the requirements of this paragraph.

(2)(i) For purposes of this paragraph, areas designated as Class I or II shall be limited to the following increases in pollutant concentration occurring since January 1, 1975:

Area designations

Pollutant	Class I ($\mu g/m^3$)	Class II ($\mu g/m^3$)
Particulate matter:		
Annual geometric mean	5	10
24-hr. maximum	10	30
Sulfur dioxide:		
Annual arithmetic mean	2	15
24-hr. maximum	5	100
3-hr. maximum	25	700

(ii) For purposes of this paragraph, areas designated as Class III shall be limited to concentrations of particulate matter and sulfur dioxide no greater than the national ambient air quality standards.

(iii) The air quality impact of sources granted approval to construct or modify prior to January 1, 1975 (pursuant to the approved new source review procedures in the plan) but not yet operating prior to January 1, 1975, shall not be counted against the air quality increments specified in paragraph (c)(2)(i) of this section.

(3)(i) All areas are designated Class II as of the effective date of this paragraph. Redesignation may be proposed by the respective States, Federal Land Managers, or Indian Governing Bodies, as provided below, subject to approval by the Administrator.

(ii) The State may submit to the Administrator a proposal to redesignate areas of the State Class I, Class II, or Class III, provided that:

(*a*) At least one public hearing is held in or near the area affected and this public hearing is held in accordance with procedures established in § 51.4 of this chapter, and

(*b*) Other States, Indian Governing Bodies, and Federal Land Managers whose lands may be affected by the proposed redesignation are notified at least 30 days prior to the public hearing, and

(*c*) A discussion of the reasons for the proposed redesignation is available for public inspection at least 30 days prior to the hearing and the notice announcing the hearing contains appropriate notification of the availability of such discussion, and

(*d*) The proposed redesignation is based on the record of the State's hearing, which must reflect the basis for the proposed redesignation, including consideration of (1) growth anticipated in the area, (2) the social, environmental, and economic effects of such redesignation upon the area being proposed for redes-

ignation and upon other areas and States, and (3) any impacts of such proposed redesignation upon regional or national interests.

(*c*) The redesignation is proposed after consultation with the elected leadership of local and other substate general purpose governments in the area covered by the proposed redesignation.

(iii) Except as provided in subdivision (iv) of this subparagraph, a State in which lands owned by the Federal Government are located may submit to the Administrator a proposal to redesignate such lands Class I, Class II, or Class III in accordance with subdivision (ii) of the subparagraph provided that:

(*a*) The redesignation is consistent with adjacent State and privately owned land, and

(*b*) Such redesignation is proposed after consultation with the Federal Land Manager.

(iv) Notwithstanding subdivision (iii) of this subparagraph, the Federal Land Manager may submit to the Administrator a proposal to redesignate any Federal lands to a more restrictive designation than would otherwise be applicable provided that:

(*a*) The Federal Land Manager follows procedures equivalent to those required of States under paragraph (c) (3) (ii) and,

(*b*) Such redesignation is proposed after consultation with the State(s) in which the Federal Land is located or which border the Federal land.

(v) Nothing in this section is intended to convey authority to the States over Indian Reservations where States have not assumed such authority under other laws nor is it intended to deny jurisdiction which States have assumed under other laws. Where a State

has not assumed jurisdiction over an Indian Reservation the appropriate Indian Governing Body may submit to the Administrator a proposal to redesignate areas Class I, Class II, or Class III, provided that:

(*a*) The Indian Governing Body follows procedures equivalent to those required of States under paragraph(c) (3)(ii) and,

(*b*) Such redesignation is proposed after consultation with the State(s) in which the Indian Reservation is located or which border the Indian Reservation and, for those lands held in trust, with the approval of the Secretary of the Interior.

(vi) The Administrator shall approve, within 90 days, any redesignation proposed pursuant to this subparagraph as follows:

(*a*) Any redesignation proposed pursuant to subdivisions (ii) and (iii) of this subparagraph shall be approved unless the Administrator determines (1) that the requirements of subdivisions (ii) and (iii) of this subparagraph have not been compiled with, (2) that the state has arbitrarily and capriciously disregarded relevant considerations set forth in subparagraph (3)(ii)(*d*) of this paragraph, or (3) that the State has not requested and received delegation of responsibility for carrying out the new source review requirements of paragraphs (d) and (e) of this section.

(*b*) Any redesignation proposed pursuant to subdivision (iv) of this subparagraph shall be approved unless he determines (*1*) that the requirements of subdivision (iv) of this subparagraph have not been complied with, or (2) that the Federal Land Manager has arbitrarily and capriciously disregarded relevant considerations set forth in subparagraph (3)(ii)(*d*) of this paragraph.

(*c*) Any redesignation submitted pursuant to subdivision (v) of this subparagraph shall be approved unless he determines (*1*) that the requirements of subdivision (v) of this subparagraph have not been complied with, or (*2*) that the Indian Governing Body has arbitrarily and capriciously disregarded relevant considerations set forth in subparagraph (3)(ii)(*d*) of this paragraph.

(*d*) Any redesignation proposed pursuant to this paragraph shall be approved only after the Administrator has solicited written comments from affected Federal agencies and Indian Governing Bodies and from the public on the proposal.

(*e*) Any proposed redesignation protested to the proposing State, Indian Governing Body, or Federal Land Manager and to the Administrator by another State or Indian Governing Body because of the effects upon such protesting State or Indian Reservation shall be approved by the Administrator only if he determines that in his judgment the redesignation appropriately balances considerations of growth anticipated in the area proposed to be redesignated; the social, environmental and economic effects of such redesignation upon the area being redesignated and upon other areas and States; and any impacts upon regional or national interests.

(*f*) The requirements of paragraph (c)(3)(vi)(*a*)(3) that a State request and receive delegation of the new source review requirements of this section as a condition to approval of a proposed redesignation, shall include as a minimum receiving the administrative and technical functions of the new source review. The Administrator will carry out any required enforcement action in cases where the State does not have adequate legal authority to initiate such actions. The Administrator may waive the requirements of

paragraph (c)(3)(vi)(*a*)(3) if the State Attorney-General has determined that the State cannot accept delegation of the administrative/technical functions.

(vii) If the Administrator disapproves any proposed area designation under this subparagraph, the State, Federal Land Manager or Indian Governing Body, as appropriate, may resubmit the proposal after correcting the deficiencies noted by the Administrator or reconsidering any area designation determined by the Administrator to be arbitrary and capricious.

(d) *Review of new sources.* (1) The provisions of this paragraph have been incorporated by reference into the applicable implementation plans for various States, as provided in Subparts B through DDD of this part. Where this paragraph is so incorporated, the requirements of this paragraph apply to any new or modified stationary source of the type identified below which has not commenced construction or modification prior to June 1, 1975 except as specifically provided below. A source which is modified, but does not increase the amount of sulfur oxides or particulate matter emitted, or is modified to utilize an alternative fuel, or higher sulfur content fuel, shall not be subject to this paragraph.

(i) Fossil-Fuel Steam Electric Plants of more than 1000 million B.T.U. per hour heat input.

(ii) Coal Cleaning Plants.

(iii) Kraft Pulp Mills.

(iv) Portland Cement Plants.

(v) Primary Zinc Smelters.

(vi) Iron and Steel Mills.

(vii) Primary Alumium Ore Reduction Plants.

(viii) Primary Copper Smelters.

(ix) Municipal Incinerators capable of charging more than 250 tons of refuse per 24 hour day.

(x) Sulfuric Acid Plants.

(xi) Petroleum Refineries.

(xii) Lime Plants.

(xiii) Phosphate Rock Processing Plants.

(xiv) By-Product Coke Oven Batteries.

(xv) Sulfur Recovery Plants.

(xvi) Carbon Black Plants (furnace process).

(xvii) Primary Lead Smelters.

(xviii) Fuel Conversion Plants.

(xix) Ferroalloy production facilities commencing construction after October 5, 1975.

(2) No owner or operator shall commence construction or modification of a source subject to this paragraph unless the Administrator determines that, on the basis of information submitted pursuant to subparagraph (3) of this paragraph:

(i) The effect on air quality concentration of the source or modified source in conjunction with the effects of growth and reduction in emissions after January 1, 1975, of other sources in the area affected by the proposed source, will not violate the air quality increments applicable in any other areas. The analysis of emissions growth and reduction after January 1, 1975, or other sources in the areas affected by the proposed source shall include all new and modified sources granted approval to construct pursuant to this paragraph; reduction in emissions from existing sources which contributed to air quality during all or part of 1974; and general commercial, residential, industrial, and other sources of emissions growth not

exempted by paragraph (c)(2)(iii) of this section which has occurred since January 1, 1975.

(ii) The new or modified source will meet an emission limit, to be specified by the Administrator as a condition to approval, which represents that level of emission reduction which would be achieved by the application of best available control technology, as defined in § 52.01(f), for particulate matter and sulfur dioxide. If the Administrator determines that technological or economic limitations on the application of measurement methodology to a particular class of sources would make the imposition of an emission standard infeasible, he may instead prescribe a design or equipment standard requiring the application of best available control technology. Such standard shall to the degree possible set forth the emission reductions achievable by implementation of such design or equipment, and shall provide for compliance by means which achieve equivalent results.

(iii) With respect to modified sources, the requirements of subparagraph (2)(ii) of this paragraph shall be applicable only to the facility or facilities from which emissions are increased.

(3) In making the determinations required by paragraph (d)(2) of this section, the Administrator shall, as a minimum, require the owner or operator of the source subject to this paragraph to submit: site information; plans, description, specifications, and drawings showing the design of the source; information necessary to determine the impact that the construction or modification will have on sulfur dioxide and particulate matter air quality levels; and any other information necessary to determine that best available control technology will be applied. Upon request of the Administrator, the owner or operator of the source shall also provide information on the

nature and extent of general commercial residential, industrial, and other growth which has occurred in the area affected by the source's emissions (such area to be specified by the Administrator) since January 1, 1975.

(4)(i) Where a new or modified source is located on Federal lands, such source shall be subject to the procedures set forth in paragraphs (d) and (e) of this section. Such procedures shall be in addition to applicable procedures conducted by the Federal Land Manager for administration and protection of the affected Federal Lands. Where feasible, the Administrator will coordinate his review and hearings with the Federal Land Manager to avoid duplicate administrative procedures.

(ii) New or modified sources which are located on Indian Reservations shall be subject to procedures set forth in paragraphs (d) and (e) of this section. Such procedures shall be administered by the Administrator in cooperation with the Secretary of the Interior with respect to lands over which the State has not assumed jurisdiction under other laws.

(iii) Whenever any new or modified source is subject to action by a Federal Agency which might necessitate preparation of an environmental impact statement pursuant to the National Environmental Policy Act (42 U.S.C. 4321), review by the Administrator conducted pursuant to this paragraph shall be coordinated with the broad environmental reviews under that Act, to the maximum extent feasible and reasonable.

(5) Where an owner or operator has applied for permission to construct or modify pursuant to this paragraph and the proposed source would be located in an area which has been proposed for redesignation

to a more stringent class (or the State, Indian Governing Body, or Federal Land Manager has announced such consideration), approval shall not be granted until the Administrator has acted on the proposed redesignation.

(e) *Procedures for public participation.* (1) (i) Within 20 days after receipt of an application to construct, or any addition to such application, the Administrator shall advise the owner or operator of any deficiency in the information submitted in support of the application. In the event of such a deficiency, the date of receipt of the application for the purpose of paragraph (e) (1) (ii) of this section shall be the date on which all required information is received by the Administrator.

(ii) Within 30 days after receipt of a complete application, the Administrator shall;

(*a*) Make a preliminary determination whether the source should be approved, approved with conditions, or disapproved.

(*b*) Make available in at least one location in each region in which the proposed source would be constructed, a copy of all materials submitted by the owner or operator, a copy of the Administrator's preliminary determination and a copy or summary of other materials, if any, considered by the Administrator in making his preliminary determination; and

(*c*) Notify the public, by prominent advertisement in newspaper of general circulation in each region in which the proposed source would be constructed, of the opportunity for written public comment on the information submitted by the owner or operator and the Administrator's preliminary determination on the approvability of the source.

(iii) A copy of the notice required pursuant to this subparagraph shall be sent to the applicant and to officials and agencies having cognizance over the locations where the source will be situated as follows: State and local air pollution control agencies, the chief executive of the city and county; any comprehensive regional land use planning agency; and any State, Federal Land Manager or Indian Governing Body whose lands will be significantly affected by the source's emissions.

(iv) Public comments submitted in writing within 30 days after the date such information is made available shall be considered by the Administrator in making his final decision on the application. No later than 10 days after the close of the public comment period, the applicant may submit a written response to any comments submitted by the public. The Administrator shall consider the applicant's response in making his final decision. All comments shall be made available for public inspection in at least one location in the region in which the source would be located.

(v) The Administrator shall take final action on an application within 30 days after the close of the public comment period. The Administrator shall notify the applicant in writing of his approval, conditional approval, or denial of the application, and shall set forth his reasons for conditional approval or denial. Such notification shall be made available for public inspection in at least one location in the region in which the source would be located.

(vi) The Administrator may extend each of the time periods specified in paragraph (e)(1) (ii), (iv), or (v) of this section by no more than 30 days or such other period as agreed to by the applicant and the Administrator.

(2) Any owner or operator who constructs, modifies, or operates a stationary source not in accordance with the application, as approved and conditioned by the Administrator, or any owner or operator of a stationary source subject to this paragraph who commences construction or modification after June 1, 1975, without applying for and receiving approval hereunder, shall be subject to enforcement action under section 113 of the Act.

(3) Approval to construct or modify shall become invalid if construction or expansion is not commenced within 18 months after receipt of such approval or if construction is discontinued for a period of 18 months or more. The Administrator may extend such time period upon a satisfactory showing that an extension is justified.

(4) Approval to construct or modify shall not relieve any owner or operator of the responsibility to comply with the control strategy and all local, State, and Federal regulations which are part of the applicable State Implementation Plan.

(f) *Delegation of authority.* (1) The Administrator shall have the authority to delegate responsibility for implementing the procedures for conducting source review pursuant to paragraphs (d) and (e), in accordance with subparagraphs (2), (3), and (4) of this paragraph.

(2) Where the Administrator delegates the responsibility for implementing the procedures for conducting source review pursuant to this section to any Agency, other than a regional office of the Environmental Protection Agency, the following provisions shall apply:

(i) Where the agency designated is not an air pollution control agency, such agency shall consult with the appropriate State and local air pollution control

agency prior to making any determination required by paragraph (d) of this section. Similarly, where the agency designated does not have continuing responsibilities for managing land use, such agency shall consult with the appropriate State and local agency which is primarily responsible for managing land use prior to making any determination required by paragraph (d) of this section.

(ii) A copy of the notice pursuant to paragraph (e)(1)(ii)(*c*) of this section shall be sent to the Administrator through the appropriate regional office.

(3) In accordance with Executive Order 11752, the Administrator's authority for implementing the procedures for conducting source review pursuant to this section shall not be delegated, other than to a regional office of the Environmental Protection Agency, for new or modified sources which are owned or operated by the Federal government or for new or modified sources located on Federal lands; except that, with respect to the latter category, where new or modified sources are constructed or operated on Federal lands pursuant to leasing or other Federal agreements, the Federal Land Manager may at his discretion, to the extent permissible under applicable statutes and regulations, require the lessee or permittee to be subject to a designated State or local agency's procedures developed pursuant to paragraphs (d) and (e) of this section.

(4) The Administrator's authority for implementing the procedures for conducting source review pursuant to this section shall not be redelegated, other than to a regional office of the Environmental Protection Agency, for new or modified sources which are located on Indian reservations except where the State has assumed jurisdiction over such land under other laws, in which case the Administrator may delegate his authority to the States in accordance with subparagraphs (2), (3), and (4) of this paragraph.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1975

No. 74-2063

SIERRA CLUB, *Petitioner*

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL., *Respondents*

THE DAYTON POWER & LIGHT CO., ET AL., *Intervenors*

No. 74-2079

SIERRA CLUB, ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL., *Respondents*

No. 75-1368

PUBLIC SERVICE COMPANY OF COLORADO, ET AL., *Petitioners*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent*

SIERRA CLUB, ET AL., *Intervenors*

No. 75-1369

UTAH POWER & LIGHT COMPANY, *Petitioner*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*

SIERRA CLUB, ET AL., *Intervenors*

No. 75-1370

STATE OF NEW MEXICO, EX REL., NEW MEXICO ENVIRONMENTAL IMPROVEMENT AGENCY, *Petitioner*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*

SIERRA CLUB, ET AL., *Intervenors*

No. 75-1371

PACIFIC COAL GASIFICATION COMPANY, ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*

SIERRA CLUB, ET AL., *Intervenors*

No 75-1372

UTAH INTERNATIONAL, INC., *Petitioner*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*

SIERRA CLUB, ET AL., *Intervenors*

No. 75-1575

INDIANA-KENTUCKY ELECTRIC CORPORATION, ET AL., *Petitioners*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent*

SIERRA CLUB, ET AL., *Intervenors*

No. 75-1663

THE DAYTON POWER & LIGHT COMPANY, ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*

SIERRA CLUB, ET AL., *Intervenors*

No. 75-1664

BUCKEYE POWER, INC., ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL., *Respondents*

SIERRA CLUB, ET AL., *Intervenors*

[No. 75-1665]

AMERICAN PETROLEUM INSTITUTE, ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*

SIERRA CLUB, ET AL., *Intervenors*

No. 75-1666

ALABAMA POWER COMPANY, ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*

SIERRA CLUB, ET AL., *Intervenors*

No. 75-1763

MONTANA POWER COMPANY, ET AL., *Petitioners*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent*

SIERRA CLUB, ET AL., *Intervenors*

No. 75-1764

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL., *Respondents*

SIERRA CLUB, ET AL., *Intervenors*

PETITIONS FOR REVIEW OF REGULATIONS PROMULGATED BY THE ENVIRONMENTAL PROTECTION AGENCY

Before: WRIGHT, ROBINSON and WILKEY, *Circuit Judges*

Judgment

These causes came on to be heard on petitions for review of regulations promulgated by the Environmental Protection Agency and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the regulations on review herein are hereby affirmed, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: August 2, 1976

Opinion for the Court filed by Circuit Judge Wright.
Circuit Judge Wilkey concurs in the result only.

APPENDIX D

Relevant excerpts from the Constitution of the United States are as follows:

ARTICLE. I.

SECTION. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

• • • •

ARTICLE. IV.

• • • •

SECTION. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

• • • •

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

• • • •

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

• • • •

APPENDIX E

Relevant excerpts from the Clean Air Act, *as amended*, 42 U.S.C. § 1857 *et seq.*, are as follows:

§ 1857. [§ 101.] Congressional findings; purposes of subchapter

(a) The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution control programs.

* * * *

§ 1857c–2. [§ 107.] Air quality control regions—Responsibility of State for air quality; submission of implementation plan

(a) Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

* * * *

§ 1857c—3. [§ 108.] Air quality criteria and control techniques—Air pollutant list; publication and revision by Administrator; issuance of air quality criteria for air pollutants

(a) (1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) which in his judgment has an adverse effect on public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before December 31, 1970, but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on—

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

* * * *

§ 1857c—4. [§ 109.] National primary and secondary ambient air quality standards; promulgation; procedure

(a) (1) The Administrator—

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national

primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1) (B) of this subsection shall apply to the promulgation of such standards.

(b) (1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attaiment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary stand-

ards may be revised in the same manner as promulgated.

§ 1857c—5. [§ 110.] State implementation plans for national primary and secondary ambient air quality standards—Submission to Administrator; time for submission; State procedures; required contents of plans for approval by Administrator; approval of revised plan by Administrator

(a) (1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 1857c—4 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines

that it was adopted after reasonable notice and hearing and that—

(A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e) of this section) in no case later than three years from the date of approval of such plan, or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants

from sources located in any air quality contol region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 1857h—1 of this title, and adequate contingency plans to implement such authority;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

(3) (A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordination Act of 1974, review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(4) The procedure referred to in paragraph (2) (D) for review, prior to construction or modification, of the location of new sources shall (A) provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 1857c—6 of this title will apply at any location which the State determines will prevent the attainment or maintenance within any air quality con-

trol region (or portion thereof) within such State of a national ambient air quality primary or secondary standard, and (B) require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as may be necessary to permit the State to make a determination under clause (A).

Extension of period for submission of plan implementing national secondary ambient air quality standard

(b) The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

Preconditions for preparation and publication by Administrator of proposed regulations setting forth an implementation plan; hearings for proposed regulations; promulgation of regulations by Administrator; transportation regulations study and report; parking surcharge; suspension authority

(c) (1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(A) the State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed,

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H) of this section.

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section.

• • • •

Applicable implementation plan

(d) For purposes of this chapter, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection (a) of this section or promulgated under subsection (c) of this section and which implements a national primary or secondary ambient air quality standard in a State.

• • • •

§ 1857c—6. [§ 111.] Standards of performance for new stationary sources—Definitions

(a) For purposes of this section:

(1) The term "standard of performance" means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emis-

sion reduction which (taking into account the cost of achieveing such reduction) the Administrator determines has been adequately demonstrated.

(2) The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant.

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

(5) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term "existing source" means any stationary source other than a new source.

Publication and revision by Administrator of list of categories of stationary sources; inclusion of category in list; publication of proposed regulations by Administrator establishing standards for new sources within category; promulgation and revision of standards; differentiation within categories of new sources; issuance of information on pollution control techniques; applicability to new sources owned or operated by United States

(b) (1) (A) The Administrator shall, within 90 days after December 31, 1970, publish (and from

time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if he determines it may contribute significantly to air pollution which causes or contributes to the endangerment of public health or welfare.

(B) Within 120 days after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within 90 days after such publication, such standards with such modification as he deems appropriate. The Administrator may, from time to time, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance or revisions thereof shall become effective upon promulgation.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollution control techniques for categories of new sources and air pollutants subject to the provisions of this section.

(4) The provisions of this section shall apply to any new source owned or operated by the United States.

Implementation and enforcement by State; procedure; delegation of authority of Administrator to State; enforcement power of Administrator unaffected

(c) (1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this chapter to implement and enforce such standards (except with respect to new sources owned or operated by the United States).

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section.

Emission standards for any existing source for any air pollutant; submission of State plan to Administrator establishing, implementing and enforcing standards; authority of Administrator to prescribe State plan; authority of Administrator to enforce State plan; procedure

(d) (1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 1857c—5 of this title under which each State shall submit to the Administrator a plan which (A) establishes emission standards for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 1857c—3(a) or 1857c—7(b) (1) (A) of this title but (ii) to which a standard of performance under subsection (b) of this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such emission standards.

(2) The Administrator shall have the same authority—

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 1857c—5(c) of this title in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 1857c—8 and 1857c—9 of this title with respect to an implementation plan.

Prohibited acts

(e) After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

• • • •

§ 1857d—1. [§ 116.] Retention of State authority

Except as otherwise provided in sections 1857c—10(c), (e), and (f), 1857f—6a, 1857—6c(c)(4), and 1857f—11 of this title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 1857c—6 or section 1857c—7 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

• • • •

§ 1857f. [§ 118.] Control and abatement of air pollution from Federal facilities: compliance of Federal departments, etc., with Federal, State, interstate, and local requirements; exemption by President of any emission source from any executive branch department, etc.; report to Congress

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so, except that no exemption may be granted from section 1857c—6 of this title, and an exemption from section 1857c—7 of this title may be granted only in accordance with section 1857c—7(c) of this title. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The

President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

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APPENDIX F

Relevant excerpts from the 1963 and 1967 versions of the federal Clean Air Act are as follows:

[PUBLIC LAW 88-206; 77 STAT. 392 (1963).]

FINDINGS AND PURPOSES

"SECTION 1. (a) The Congress finds—

• • • •

"(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and

• • • •

"(b) The purposes of this Act are—

"(1) to protect the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

• • • •

[PUBLIC LAW 90-148; 81 STAT. 485 (1967).]

FINDINGS AND PURPOSES

"SEC. 101. (a) The Congress finds—

• • • •

"(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and

• • • •

"(b) The purposes of this title are—

"(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

• • • •

APPENDIX G

The following parties to the consolidated proceedings in the court below are not, insofar as petitioners can determine, adverse to the positions taken in this petition, but are Rule 21(4) respondents:

Buckeye Power, Inc.
Ohio Valley Electric Corporation
Indiana-Kentucky Electric Corporation
Indiana & Michigan Electric Corporation
Indiana Statewide Rural Electric Cooperative, Inc.
Indianapolis Power and Light Company
Northern Indiana Public Service Company
Public Service Company of Indiana, Inc.
Southern Indiana Gas and Electric Company
Utah International, Inc.
American Petroleum Institute
Standard Oil Company
Atlantic-Richfield Company
Continental Oil Company
Exxon Corporation
Gulf Oil Corporation
Mobil Oil Corporation
Shell Oil Corporation
Texaco, Inc.
Union Oil Company of California
Utah Power and Light Company
Public Service Company of Colorado
Colorado-Ute Electric Association

Platt River Power Authority
Cheyenne Light, Fuel and Power Company
Alabama Power Company
Georgia Power Company
Gulf Power Company
Mississippi Power Company
Western Energy Supply and Transmission Associates
Arizona Public Service Company
Arizona Power Cooperative, Inc.
Nevada Power Company
Salt River Project Agricultural Improvement and Power District
San Diego Gas & Electric Company
Southern California Edison Company
Tucson Gas & Electric Company
Edison Electric Institute
Kentucky Utilities Company